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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~917~~. 52

JOHN M. MOFFITT, PLAINTIFF IN ERROR,

vs.

CHESTER A. ARTHUR, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 16, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 2, 1888.

1 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. Circuit Court, South. Dist. New York.]

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between John M. Moffitt, plaintiff, and Chester A. Arthur, defendant, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of July, in the year of our Lord one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 [Endorsed:] 4727. U. S. Supreme Court. John M. Moffitt, plaintiff in error, against Chester A. Arthur, defendant in error. Writ of error. Due service of a copy of the within is hereby acknowledged this 14th day of July, 1886. Stephen A. Walker, Jr., U. S. att'y, for def't in error.

[Stamped:] U. S. circuit court, July 14, 1886. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, }
South. District of New York, } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the
3 second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to seventy-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of John M. Moffit, plaintiff in error, against Chester A.

Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 *Summons for Relief.*

Supreme Court, City and County of New York.

JOHN M. MOFFIT, Plaintiff,
ag'n't
CHESTER A. ARTHUR, Defendant.

To the defendant:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the city and county of New York, at the county court-house in said city, and to serve a copy of your answer to the said complaint on the subscribers, at their office, number fifty-one William street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to
5 answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated New York, Feb'y 23d, 1876.

HARTLEY & COLEMAN,
Plaintiff's Attorneys.

Endorsed: Supreme Court. John M. Moffit against Chester A. Arthur. Summons. Hartley & Coleman, plaintiff's attorneys, 51 William street, N. Y. city. Rec'd Feb. 23, '76.

6 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Chester A. Arthur, defendant, by John M. Moffit & *al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of New York on the 11th day of September, 1876, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 3d day of August, in the year one thousand eight hundred and seventy-six.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

GEORGE BLISS,
United States Attorney, Attorney for Defendant.

7 [Endorsed:] U. S. circuit court. Chester A. Arthur *ads.* John M. Moffit *et al.* Copy certiorari. George Bliss, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

Yours, GEORGE BLISS,
Attorney for Defendant.

New York, Aug. 31, 1876.

To —— ——, plaintiff's attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Aug. 31, 1876.

HARTLEY & COLEMAN,
Plaintiff's Attorneys.

8 *Bill of Particulars.*

Supreme Court, City and County of New York.

JOHN M. MOFFITT *ag't* CHESTER A. ARTHUR.

Name of importer: John M. Moffitt.
Description of goods: Granite, monumental, & building stone.
Name of vessel: Ben Bolt, Ben Bolt, Ben Bolt.
Whence imported: St. George, N. B.
Date of invoice: June 24, 1875, Oct. 3, 1875, Nov. 27, 1875.
Date of entry: July 9, 1875, Oct. 22, 1875, Dec. 23, 1875.
Date of payment of duty in excess: July 9 & Oct. 5, 1875, Oct. 23, 1875, Dec. 23, 1875.
Amount exacted in excess: $582.30, $1,185.00, $895.40=2,662.70.
Protest filed: Aug. 14, 1875, Dec. 13, 1875, Jan. 13, 1876.
Date of appeal to Secretary of the Treasury: Aug. 14, 1875, Dec. 13, 1875, Jan. 13, 1876.
Date of decision by Secretary of the Treasury: Dec. 13, 1875, Feb'y 21, 1876, Feb'y 21, 1876.

HARTLEY & COLEMAN,
Attorneys for Plaintiff.
GEORGE BLISS,
Attorney for Defendant.

9 Endorsed: Supreme Court. John M. Moffitt ag't Chester A. Arthur. Bill of particulars. New York, Feb'y 24, 1876.

To Hon. George Bliss, defendant's attorney.

SIR: Please to take notice that this action is brought to recover duties illegally exacted by the defendant as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars.

HARTLEY & COLEMAN,
Plaintiff's Attorneys, 51 William Street.

Due notice hereof admitted. Service of copy complaint waived this — day of ——, 187–.

——— ———,
Defend't's Att'y.

10 *Complaint.*

THE UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of New York.

JOHN M. MOFFITT, Plaintiff,
vs.
CHESTER A. ARTHUR, Defendant.

Plaintiff complains—

1st. That defendant was during the time hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiff during said times duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That defendant, as such collector, exacted from plaintiff as and for duties thereon, viz., at the rate of twenty per cent. ad valorem.

11 4th. That by the laws of the United States the true duty upon said goods was at the rate of one dollar and fifty cents per ton, and plaintiff in order to obtain said goods *were* compelled to pay the sum of twenty-six hundred & sixty-two $\frac{70}{100}$ dollars in gold coin of the United States in excess of the amount required by law.

5th. That plaintiff filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

6th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who affirmed the decision of the defendant.

12 7th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

8th. That said sum in U. S. gold coin so exacted has never been repaid to plaintiff, and is still due and owing to *them*.

Wherefore plaintiff demand- judgment against defendant for twenty-six hundred and sixty-two $\frac{70}{100}$ dollars, in United States gold coin, with interest on the several sums named in the bill of particulars from the several dates of payment, as appear thereby.

HARTLEY & COLEMAN,
Attorneys for Plaintiff.

13 STATE OF NEW YORK, } ss:
City and County of New York, }

—— ——, of the plaintiffs, being duly sworn, says he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

—— ——.

Endorsed: U. S. circuit court. John W. Moffet ag't Chester A. Arthur. Complaint. Hartley & Coleman, pl'ff's att'ys, 51 William St., New York city.

14 United States Circuit Court, Southern District of New York.

JOHN M. MOFFIT *vs.* CHESTER A. ARTHUR, Collector, &c.

The defendant herein, answering the complaint of the plaintiff herein, says:

I. That he admits he was, at the time in said complaint mentioned, collector of the port of New York, and in such official capacity received payment from the plaintiff for and on account of duties due to the United States under the laws thereof upon certain importations of merchandise imported by said plaintiff into the port of New York from foreign countries.

II. And defendant alleges that any and all moneys received
15 by him from plaintiff at the times in said complaint mentioned were paid by said plaintiff as a debt due by him to the United States and not otherwise, and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury and for and on account of the United States, and were forthwith thereafter and before the commencement of this action or the service of any protest paid into the Treasury of the United States, and that the amounts of said moneys so received from plaintiff were the amounts due from him to the United States according to the rate of duty imposed by law upon the several arti-
cles of merchandise by him imported and assessed with duty,
16 and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiff.

III. And defendant, further answering, denies that he has at

this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint by the marks and numbers and description there given, except in so far as to state—and defendant herein answering doth aver and state—that said merchandise *were* dutiable, according to the laws of the United States, at the rates at which the same *were* assessed.

IV. And defendant, further answering, admits that plaintiff
17 filed with defendant certain protests, but he denies that he has certain information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiff conformable to the laws of the United States, and defendant leaves plaintiff to make such proof thereof as he may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same and each thereof and leaves the plaintiff to make such proof thereof as he may be advised.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

GEORGE BLISS,
U. S. Attorney, for Defendant.

18 Endorsed: U. S. circuit court, southern district of New York. John M. Moffit *v.* Chester A. Arthur, collector, &c. Answer George Bliss, U. S. att'y, for def't. Due service of a copy of the within answer is hereby admitted. New York, Dec. 12th, 1876. Hartley & Coleman.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Alfred C. Coxe, circuit judge.

JOHN M. MOFFITT
vs. } 4727.
CHESTER A. ARTHUR.

Now comes the plaintiff, by Hartley & Coleman, Esqrs., *their* attorneys, and move the trial of this cause; likewise comes the defendant, by Samuel B. Clarke, Esq., ass't U. S. att'y, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Thursday, December 13, 1886, the jury retire, and on their return render a verdict whereby they find for the defendent.

It is ordered that the plaintiff have a stay of proceedings on said verdict for thirty days.

A copy.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

20 *Judgment.*

United States Circuit Court, Southern District of New York.

JOHN M. MOFFITT
vs.
CHESTER A. ARTHUR. } 4727.

The issues in this action having been brought on for trial before Mr. Judge Coxe and a jury, at a circuit court of the October term, 1883, and the issues having been tried, and a verdict for the defendant having been duly rendered on the thirteenth day of December, 1883, and his costs having been adjusted at $62.35, now, on motion of Stephen A. Walker, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $62.35, his taxed costs, and have execution therefor.

Judgment signed this 7th day of July, 1886.

JOHN A. SHIELDS,
Deputy Clerk.

21 [Endorsed:] 4727. United States circuit court. John M. Moffitt *vs.* Chester A. Arthur. Judgment-roll. Stephen A. Walker, United States attorney, for defendant. Costs, $62.32. U. S. circuit court. Filed July 7th, 1886, 12.30 p. m. Timothy Griffith, cl'k.

22 *Bill of Exceptions.*

U. S. Circuit Court, Southern District of New York.

JOHN M. MOFFITT
vs.
CHESTER A. ARTHUR. } No. 4727.

Be it remembered that at the term of this court of October, 1883, to wit, on the 11th, 12th, and 13th days of December, 1883, this action was tried before the Honorable Alfred C. Coxe, U. S. district judge for the northern district of New York, duly assigned to hold the October term of this court aforesaid, and a jury duly empanelled and sworn in this action.

At the trial the plaintiff was represented by his counsel, Edward Hartley and Walter H. Coleman, and the defendant by his counsel, Elihu Root, U. S. attorney for the southern district of New York, and his assistant, Samuel B. Clark.

And in the course of the trial the said counsel for the plaintiff did take and allege sundry exceptions to the rulings and charges of the court, and to the refusal of the court to give instructions to the jury as then and there prayed for by them, and to the refusal of the court to submit the evidence in said cause to the jury, as are
23 more particularly hereinafter set forth.

Upon the trial the following, among other things, occurred:

To sustain the issues on the part of the plaintiff the latter adduced evidence showing three separate importations, one in each of the months of July, October, and December, 1875, by the schooner Ben. Bolt from St. John, New Brunswick, into the port of New York. The invoices of the July importation described the articles imported as 66 cases polished red granite, containing forty-five cubic tons in weight. The appraiser at the port of New York, after examining these articles, reported them to be 44 cases monuments and 22 cases polished panels, and classified them for duty at 20% as non-enumerated manufactured articles.

The invoice of the October importation described the articles imported as 99 cases polished red granite, containing eighty cubic tons in weight, and 43 cubic tons rough red granite. The specifications annexed to this invoice detailed the said 99 cases as follows:

20 cases columns (40), pedestal job.
13 cases sundries, Dime — Bank.
2 cases tomb, Struthers & Sons.
44 cases sundries, flower fountains.
4 cases columns (8), Coleman & Volk.
11 cases sundries, lamp pedestal.
24 2 cases columns, J. M. Moffitt.
3 cases obelisk, San Francisco.

The appraiser of the port of New York, after examination, reported the articles on this invoice to be monuments and rough granite, and classified the 99 cases for duty at 20% as non-enumerated manufactured articles, and the 43 cubic tons rough red granite he classified for duty at $1.50 a ton as granite, rough and unmanufactured.

The invoice of the December importation described the articles imported as 96 cases polished red granite, containing eighty-one and $\frac{7}{12}$th cubic tons in weight. The specification annexed to the invoice gave the details of the said 96 cases as follows:

52 cases sundries, Washington job.
1 case pedestal, Coleman & Volk.
1 case, one column, Dime Savings' Bank.
2 cases tomb, Struthers & Sons.
3 cases, 3 columns, Philadelphia job.
3 cases monuments, 3 cases monuments, 3 cases monument, 3 cases monument, 3 cases monuments, 3 cases monument, 3 cases monument, 3 cases monument, 3 cases monument, 2 cases monument, 5 cases monument, 3 cases monument.

The appraiser of the port of New York, after examination, returned the articles on this invoice as monuments and as pol-
25 ished granite, and classified them at 20% as non-enumerated manufactured articles.

The plaintiff's entry of the articles imported in the July importation described them as 66 cases building stone. His entry of the October importation described the articles imported by that importation as 99 cases polished granite and 14 pieces rough granite. His entry of the articles imported in the December importation described them as 59 cases polished red granite and as 32 cases monuments.

The defendant as collector levied and collected the following rates, viz: On the fourteen pieces of "rough red granite" a duty of $1.50 per ton under the provisions of § 2503 and Schedule M of § 2504 of the Revised Statutes of 1874, then in force, viz., § 2503: "There shall be levied, collected, and paid upon all articles mentioned in the next section imported from foreign countries the rates of duty which are by the schedules, respectively, prescribed. § 2504, Schedule M: "Stones, freestone, granite, sandstone, and all building or monumental stone, except marble, one dollar and fifty cents per ton," and on all the remainder of the importations be levied and collected a duty 20% ad valorem under § 2516 of said statutes, which is as follows: "There shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not herein enumerated or provided for a duty of ten per centum ad valorem, and on all
26 articles, manufactured in whole or in part, not herein enumerated or provided for a duty of twenty per centum ad valorem."

Testimony was given tending to show that the requirements of section 2931 Revised Statutes were complied with in this case.

The protests stated the following grounds of objection, viz:

"SIR: We protest against your decision as to the rate and amount of duties to be paid on the granite building stone and on the granite monumental stone (entered by us, &c.), because each of the above articles is dutiable at $1.50 per ton under Schedule M, title 33, U. S. Revised Statutes, by specific enumeration. See also section 2499 of said title relative to similitude. We pay the excess exacted under compulsion solely to get the goods.

"To the collector of customs, New York."

It was agreed by counsel for the respective parties in open court at the trial that whatever verdict might be renderd by the jury should be subject to computation under the direction of the court.

As to the merchandise in question the following proof was received:

27 JOHN M. MOFFITT, being examined by plaintiff's counsel, said that he was the plaintiff, and by occupation a monumental sculptor; that he had been in the granite business for upwards of ten years, and in 1875 was engaged in the importation of granite into the United States.

I made the importations in question. The July invoice included a number of cases containing part cut and polished work—part cut and part hammered granite for the interior of the public buildings in Philadelphia—pedestals for the columns to rest upon of the building. I believe there were some polished ashlar panels, but really at the present moment I am not positive. Ashlar is the surface cut or polished for insertion into the walls of the exterior or interior of a building, and that has to be cut and trimmed on the ground. As a rule, it is building work—building stone.

The invoice of the October entry was for the Dime Savings Bank of the City of New York—the polished columns standing in front of

that building—and also thirteen cases containing polished ashlar for the purpose of being cut into spandrels, on arrival, to be put into the exterior of a building.

These goods arrived here in an unfinished condition. A spandrel is the space between a square doorway and the arch set beneath.

28 There are two cases containing a tomb consigned to me. It was in two parts. One had to be completed here and lettered and certain portions had to be recut. No base was attached to it. The base had to be supplied when it reached here.

The next is 44 cases called sundries. That was the enclosure of a gray granite flower parterre similar to a fountain, for the Capitol grounds at Washington. It was a complete work, in as far as it was moulded and polished, but it had to be, to a certain extent, to a great extent, recut on its arrival at the Capitol, at Washington. There were four columns for a building consigned to a firm in New York, but the columns were without bases or capitals; simply the column alone; just the shaft incomplete.

The next is eleven cases called "sundries"—that is to say, they were pedestals for the standard lamps in the Capitol grounds at Washington. They were in sections and had to be fitted to other stone, other material. These goods were only partially polished. The next is an obelisk and the lower base and the middle base with the die, so far as I can understand, but not complete.

The November importation contained 22 cases for the Washington job—that is, for the Capitol grounds. That contains stuff for material—part polished granite—for the completion of another

29 large parterre or enclosure, a granite curb; also a pedestal and a column. The second is two cases containing a tomb for Struthers & Son, of Philadelphia. It was in two pieces. The design consisted of three pieces. For the third part of the design a native granite was used. Three columns for the Philadelphia public buildings. The next is three cases containing a monument, and there is quite a list here of small monuments apparently or unrelated parts of monuments. They were in all cases incomplete—that is to say, they were invariably deficient in the lower part and they had to be completed, and in some instances the lower base had to be recut. They were not complete when they arrived here.

Granite will vary anywhere from 176 pounds per cubic foot; 174 to 176 it varies. Granites vary in weight. Some are less than that. I have been in the granite business, more or less, for the last ten years, off and on; probably more.

The material out of which these goods are made is granite. The specific uses to which these goods were to be applied was for buildings and outside structures and interior construction.

The purpose of those that were marked monuments was to be erected in cemeteries for monumental purposes. The labor that was put upon this granite was for the purpose of fitting it for building and monumental purposes.

30 These goods were "granite," as that term is known and generally used.

On cross-examination he testified:

On the invoice, dated October 3rd, 1875, is the entry, "14 pieces of rough granite." They were unequal-shaped blocks, rough blocks—that is to say, they were quarried to dimensions, but they were of various sizes. They were cut so as to be put right into a building. If they were intended for rough ashlar they were cut in that shape. They were cut in such a way that they were nearly ready to be inserted in a building, not quite; they were trimmed, I think some of them, not altogether. Take one of the panels spoken of that differs from the rough granite simply in one face being polished and the rest all rough—beds, joints, and backs left with the quarry face as quarried, but the face polished. Before the panel is put up in its place the beds and joints have to be worked and probably the backs. The joint is the vertical or upright part. Those joints have to be worked before they can be put into place, and frequently the back of the ashlar has to be backed or cut so as to make it fit in position. The stone has to be fitted to the emergency of the building. The panel is complete except its actual fitting into the wall. Something was done after it was brought here.

31 The columns represented here, before they were set in place, would probably in many cases have to be bottomed and top-jointed; sometimes they have to be recut, sometimes not. Sometimes they would come so perfect that there would be no necessity to do it. They are all ready except fitting for whatever is above it and whatever is below it, unless there is what we call engraving on it. That is done here always.

These things I ordered as columns because they were for a building; they came as columns.

The relative value of a column compared with so much rough granite of the same weight depends entirely on the length of the column. A column that is, say, only three or four or five feet long would be so much a column; ten or twelve feet long would cost a great deal more in proportion. Assuming that the granite in each case is the same length, in the one case it is rough and in the other case it is finished into a column, the difference in value is a variable quantity. It would be four, five, or six times as much. We buy by the lineal measurement and the diameter. We generally buy it by the cubic foot; it is substantially by weight. That is the way we get at the weight.

We buy and sell columns by weight. We give orders for columns and execute them by their length and their diameter. That determines the price. We fix the price on them in that way, so much a line foot, with great regard to the diameter. Columns are usually ordered for particular purposes, and then the price depends

32 on the order. Granite is so ordered usually. The value is got at by the cubic measurement. The articles that are called "sundries" here did not have a name by themselves because they came in a somewhat rough state; they had to be cut when they came here; only the surface was polished. These articles were not all polished. A large portion of it was polished, but not all; some

of them were left what we call hammer cut—about seventy-five per cent.—that is, on this invoice. In ordering I generally send on a copy of the plans, and I may say that is a column or that is so and so, but I send a copy of the plans to be worked from without stating any particular name for them. "There is the plan; carry out this contract."

Pedestals, tombs, monuments, shafts, and panels are made of marble as well as of granite, and are used for the same purposes.

RICHARD M. UPJOHN, a witness introduced for the plaintiff, upon his examination by plaintiff's counsel testified that he was an architect of thirty years' practical experience in the erection of buildings in New York, Washington, Albany, Hartford, Boston, and a great many other places in the United States.

When a stone building is to be erected the plans and specifications are first made and approved. Advertisements are then issued
33 for proposals to furnish the stone of which it is to be built, such as granite, brown stone, marble, &c. The proposals are received from contractors or quarrymen—all called contractors who are people engaged in furnishing granite, &c. Contracts are then entered into with them. The plans and specifications are then used by the contractors in the construction of the proposed work. The plans designate certain shapes, and the material is cut to conform thereto. The particular style of finish is designated in the specification, and must be described therein whether rough, worked, or polished. If a quarry face is wanted, or a crandelled face, &c., each must be separately specified. If the material is desired to be in the rough you must say so. All must be specified in detail. When speaking of all these together, *i. e.*, generally, you speak of them so as to describe the material. I heard Mr. Moffitt's description of these different cargoes imported by him.

Granite was the proper term to describe them in general. I never heard granite spoken of otherwise than as granite. No matter
34 what its stage of finish is, it does not change its name from the time it is in the quarry until it goes into the building. That is the only way I ever knew it to be described. I know this to be the general custom throughout this country and in Europe. It is always called granite if the material is granite without regard either to the style of finish or the shape of the pieces or anything of the kind. I never heard any other idea broached.

Q. When the term "building stone" is used throughout the United States in the stone trade and in your profession amongst architects and all those people, what does it mean?

A. It means any stone available for building.

Q. Whether it is just ready to put into the building or at any prior time?

A. Yes; it means any stone available for building, whether cut or uncut. Some buildings are largely monumental in their character, such, for instance, as the New York custom-house or the post-office building, &c., and the stones that are used are monumental

stones, depending on their size. If you are building a monumental building monumental stone is necessary to sustain it.

35 The articles imported in this case, described by Mr. Moffitt as shafts, dies, parts of monuments, &c., fall under the common and accepted definition of monumental stone if they were intended for monumental use. They might also be called dimension stone or monumental stone, and they would also be included under the term granite.

Upon cross-examination by defendant's counsel Mr. UPJOHN further testified:

A granite column is necessarily a building stone. The building could not stand up without it. A column is composed of a capital, a base, and a shaft. I don't know that I ever heard a column called a building stone any more than any other particular detail of a building. In speaking of the detail of a building I mean any part of a building—a cap or column, which is generally described by the architect in his specification. It is rather material if it is the architect who uses the term. In speaking of columns you don't speak of them as building stones—you call them columns. I should describe it by its architectural cognomen. I should buy them as shafts, probably, but no form of architecture can be considered aside from the material. I should designate the kind of material of which a shaft consisted, whether granite, marble, &c.

36 The meaning of building stone in trade and commerce is any stone that is available for building. I don't know that the ordinary meaning is any different. Granite as it comes out of the quarry is generally in rough blocks squared up. In rough, irregular shapes it may sometimes be bought and sold, but generally it is not so. Red granite imported into this country is mostly polished, usually cut and not rough. The columns of a building and the shafts, if finished, are bought and sold under their specific names, and it usually depends on the particular circumstances of a particular case.

J. JAMES R. CROES, a witness for the plaintiff, being examined by plaintiff's counsel, said that he was a civil engineer in New York city, one of the board of directors of the American Society of Civil Engineers, and a member of the Institution of Civil Engineers of England, having had twenty-five years' practical experience as a civil engineer, and was familiar with granite and building stone.

The importations in this case described in detail as building work for the Dimes Savings Bank, &c.—shafts, ashlar, ashlar for spandrels, &c.—are known in the engineering profession and among contractors and people who buy, sell, and use them under the general name of building stone and also as granite.

37 Q. Is it or is it not true that there is in the use of the term granite, as a general term, any qualification, implied or otherwise, restricting that term to any stage of preparation or finish of the article?

A. In the use of the word "granite" there is no limitation in general as to its condition. It is common to ask for proposals for the construction of public work, buildings, or masonry, constructions of any kind—for proposals, I say, for "granite." In the specifications and the contract the different characters of the different kind of stones which are to be used are expressly designated, but all come under the general classification of granite.

Q. In the use of the term "building stone" is there any reservation or restriction implied to any particular stage or condition of finish, using it as a general term?

A. The custom is, where all the stone of a structure, as is frequently the case, is asked for at one time, to head the advertisements and to head the general specifications and the contracts as "proposals for," "specifications for," or "contract for" stone for such and such a work. Then the specifications follow out and, speaking of details, give details under the general head. In those details
38 each particular stone is treated of its dimensions, size, position, style of finish; everything necessary to complete the details included under that general head.

My experience has been general, and the facts stated as to the general meaning and use of the terms are those which generally obtain throughout the country.

Upon cross-examination by defendant's counsel the witness further testified that a column or shaft or pedestal which enters into the construction of a building is building stone and is known as building stone.

Columns, caps, dies, &c., are practically limited in their uses to the uses of columns, caps, dies, &c.

"Granite in the rough" is granite as it comes from the quarry without the faces of the stone having been dressed or hammered down to an even surface.

Granite, being an expensive stone, is generally quarried out to dimensions as nearly as possibly to those in which it is to be used—that is, the condition in which it leaves the quarry. The avocations of a stone-cutter and a quarryman are different. The same business is carried on very largely by the same firm or persons, but the actual stone-cutters and quarrymen are different classes of laborers. The stone as quarried is itself an article of merchandise and is used for building and monumental purposes, which
39 are the principal uses. Granite is also used for paving. Building stone is erected by the mason.

Before the stone is taken out of the quarry you have the plan and mind of the architect and designer, because you have the stone quarried to the nearest dimensions in the rough to make it work to the perfect shape. The dimensions of the stone are sent to the quarryman and the stone-cutter is furnished with the design of the architect, and the stone cut accordingly. The work of the architect is considered to be worth five per cent. of the value of the completely finished stone; that of the quarryman is very variable, depending on the character of the quarry and of the dimensions of the stone to be

quarried. Speaking very roughly, the value of the stone in the quarry merely is from ten to fifty per cent. of the value of the finished stone.

In the case of granite such as is used in structures in cities or for special dimensions the practice is that the stone is not quarried even until the specifications and plans of the building in which the material is to be used are adopted, and then it is quarried and cut according to those specifications. In every quarry there is material not adapted to "dimension stone," which is removed without reference so much to its size as long as it will work into the building somewhere; that is also building stone—anything is building
40 stone which is essential to hold the building up, and is so generally known and called.

"Rough granite" is valued by weight and cubic foot. The value of a column depends on the quality of the stone, its cubic contents, the shape into which it has to be quarried, and the kind of cutting for the desired form. I have never dealt in granite as a merchant, but I have purchased it as a civil engineer.

The further evidence offered by plaintiff tended to show that granite and marble are composed of different materials. Marble is limestone; granite is feldspar, hornblende, &c.; granite is much stronger than marble and more powerful in resisting crushing strains; both marble and granite are used for buildings and for monuments, but marble has more uses than granite; in color New Brunswick granite is red; there are red marbles, but they are not so desirable to use outside as granite, because the face of the marble does not hold so long under exposure to the weather as granite.

Marble is more soft and easier worked than granite and is not so expensive. Marble is used for furniture, table tops, counters, butchers' and plumbers' slabs, &c., for which purposes granite is not used.

The testimony having been closed on behalf of the plain-
41 tiff, the defendant's counsel thereupon moved the court to direct a verdict in favor of the defendant; which motion the court then denied, ruling, however, as follows on said testimony, viz:

First. That as matter of law under the authority Coleman *vs.* Murphy, Shipman, J., polished granite is not included under the enumerations of the statute of granite or building stone or monumental stone; to which ruling the plaintiff's counsel then and there excepted.

Second. That as matter of law the importations in question were manufactured articles; to which ruling the plaintiff's counsel then and there excepted.

Third. That he should instruct the jury that if they should find that any of the different articles in suit more closely resemble some other article mentioned in the statute than they do the enumerated articles, granite, building stone, or monumental stone, that then their verdict should be for the defendant; to which the plaintiff's counsel then and there excepted.

Fourth. The plaintiff's counsel asked the court to submit both issues upon the evidence to the jury, to wit, the question of the

enumeration by the statute of plaintiff's importations and also the question arising under the similitude rule, and the court announced that it would refuse to submit to the jury the question as to enumeration and the evidence thereon; to which ruling the plaintiff's counsel then and there excepted.

42 The following testimony was then offered on behalf of the defendant:

JOHN MCALLISTER, a witness for the defendant, testified upon his examination by defendant's counsel:

I have been engaged in the "granite business" for ten years. The "granite business" includes the manufacturing of granite or the quarrying of granite. I am engaged in both, having an office and works in New York and a quarry at Round Pond, Maine. We sell manufactured granite to dealers and to those who buy direct for themselves for buildings and monumental purposes.

Granite is first quarried out of the rock by drilling holes to put in wedges and splitting it off; that is the first process, and gives what we call "rough granite." Then it has to be dressed into different forms and shapes, as required. It may be rough, cut, or patent hammered, or polished or carved. These are all processes of finishing granite. Monuments leave our hands in different conditions of manufacture, generally as completed parts sent separately to the place where they are to be put up.

Q. In your judgment does a granite monument substantially resemble a marble monument?

43 Objected to by plaintiff's counsel on the ground that the pleadings cut off this line of defense, the collector by his answer having asserted that he levied the legal rate of duty. Objection overruled by the court, and plaintiff's counsel excepts.

Further objected to as incompetent—the witness should state the facts and the points of agreement or disagreement. Objection overruled by the court, and plaintiff's counsel excepts.

A. If it was cut in the same shape it would resemble the same form and be used for the same purpose, and the same as to granite and marble pedestals, columns, tombs, obelisks, curbs, spandrels, &c.

If the articles are cut alike they would be exactly alike; they would resemble each other as far as shape and form are concerned, though they may be different in color. There are different colors both of marble and granite.

I know what rough granite is. A granite column, in shape and in the use to which it is put, more resembles a marble column than it does a piece of rough granite.

On cross-examination by plaintiff's counsel the witness further testified:

There is some marble that in appearance, when finished, in a

measure somewhat resembles Bay of Fundy granite, but I
44 would not suspect it to be that granite. In texture there is some marble that has a vague sort of resemblance to Bay of Fundy granite—not near enough to be mistaken one for the other. Marble went out of fashion for monumental and building purposes because of its perishable nature; it would not stand exposure to the elements. Red granites were used for their color. You could not use marble to produce the effect.

Red granite is used in building to produce the artistic effect of color and for strength. Marble is not used for this, that I know of.

Marble is applied to many uses that granite is not, such as furniture work, mantels, plumbers' slabs, &c. Granite is stronger than marble. Bay of Fundy granite is a good, strong granite.

SEYMOUR E. SMITH, a witness for defendant, testified on his examination by defendant's counsel:

I am an examiner in the appraiser's department of the New York custom-house, and examined and passed these importations. They are called polished granite and are named with specific names as pedestals, columns, tombs, monuments, &c. They all appeared to us to be the same thing, in fact—polished granite—and were classified under one head as non-enumerated manufactured articles, because we considered it as a fact that the manufacture was the chief
45 value of the goods—seventy-five or eighty per cent., I believe. The various imported pieces each came in a separate box. It is customary to have a base of American granite. The only resemblance that I think of between the rough granite in the invoices and the polished granite was in texture. These articles were all made from the natural granite.

Q. The point of the question is as to the difference of material; there is a tomb mentioned there—a pedestal and an ashlar. Are all those mentioned there made from marble?

A. Yes, sir; these are all made of marble—similar.

Q. And are they put to the same uses to which those granite columns are put?

A. Yes, sir; as far as I can think at present.

On cross-examination by plaintiff's counsel the witness further testified:

The same goods could not be made of marble; the texture would not be there. Obelisks, pedestals, &c., are made of marble. The articles in these importations that I have called monuments consisted of polished pieces of granite. I cannot say what portion of the pieces were there or how many monuments they were to compose when made up. There were no bases. What each piece was to go with I cannot say. My impression is that there were some complete monuments without bases.

46 Imported marble is generally white; Scotch granite and Bay of Fundy granite is red. If a man wanted a Scotch granite monument he would not be satisfied with a marble monu-

ment. Granite is the only thing that is lasting under exposure to the weather. The polish on granite will last hundreds of years; that on marble soon disappears, and in cemeteries, &c., it becomes stained.

DAVID S. TABER, a witness sworn for the defendant, on examination by defendant's counsel testified:

I am an importer and dealer in marble and sell marble monuments, obelisks, columns, urns, caps, dies, sections of tombs, &c. As sold and delivered they are not put together. A marble monument consists of bases, dies, caps, and columns or spires. Other stone is generally put with them, such as a base, sub-base, &c. What we sell is only in pieces. Of a granite monument and a marble monument, both pieces being equal in size, the marble piece and the granite piece being similar in polish and shape, the resemblance would be greater between them than the resemblance of the granite monument to a piece of rough granite.

Upon cross-examination by plaintiff's counsel he further testified:

47 The material of the rough granite and the polished granite is the same. The use of rough granite is to be made up for building and monumental purposes. The texture of rough granite and polished granite are both the same—the texture of the rock. There are differences between granite and marble in regard to durability under exposure to the weather and the crushing strain each will bear, &c. Gneiss, gneissoid, cyanite, and porphyry are building stones. A base is a necessary part of a monument. A contract for a monument would not be fulfilled by delivering a plinth, cap, &c. A monument has to be erected as a structure in order to be a monument. A foundation hole must be dug in the ground, the foundation laid, and the monument erected stone by stone, and then it is a monument, although the parts are sold as monuments before they are put together.

JOHN N. DYER, a witness sworn for the defendant, on examination by defendant's counsel testified:

My business is the granite business. In the granite business we do monumental and fitting work; we build monuments and buildings and cut building stones. We do the work for masons, sometimes for the owners. We make monuments and set them up in the cemetery. The articles in their parts before they are erected are called monuments.

48 On cross-examination by plaintiff's counsel he further testified:

Q. Do you set stones?
A. Yes, sir; we set our own monuments in general.
Q. Do you set building stone?
A. Sometimes we do; very rarely; we generally give that out.

The people who set that stone are called granite-setters and brown-stone-setters and any kind of stone they set. They can set any kind of stone.

Q. In what condition is the stone when it is set?

A. Why it is finished. The man setting the stone is called a stone-setter. I understand very little about marble; I am a granite man entirely.

The evidence on both sides having been closed, the plaintiff's counsel moved the court to direct a verdict in favor of the plaintiff; which motion the court denied, and to which refusal the plaintiff's counsel then and there excepted.

The plaintiff's counsel then submitted to the court separate and distinct requests to charge the jury. The court then charged the jury as follows:

GENTLEMEN OF THE JURY: As before stated in your presence, the court has some doubt whether there is any question of fact,
49 any disputed question of fact, to be submitted to the jury; but, there being a doubt, it is thought the wiser course to send the case to you for your determination. The question, the moment you understand it, is a remarkably simple one and comprised within exceedingly narrow limits. It seems upon the proof before you that in the years 1874, 1875, & 1876, or, at any rate, subsequent to the passage of the Revised Statutes, the plaintiff, Mr. Moffitt, imported into this country from New Brunswick granite in the shapes and forms that have been described to you. There were granite columns or shafts, granite blocks, polished and unpolished, pedestals, a parterre for a fountain at the National Capitol, columns for the Dime Savings Bank in the city of New York, interior work, ashlar-work, for a building in Philadelphia, and all of them, with a few exceptions, were articles which had been subject to manipulation after the stone had been taken from the quarry. This work has been described to you; the stone is first quarried, then subjected to polishing or hammering, as the case may be, and fitted for the purposes for which it is intended. Coming to this port the collector classified them under the last section of the statute and levied a duty accordingly. That section is:

"There shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not herein enumerated or
50 provided for a duty of ten per centum ad valorem, and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem."

You may find, gentlemen, upon this proof that these articles were covered by this section of the statute—that is, that they were manufactured articles not before provided for, either directly or by similitude, with other articles mentioned in other portions of the statute. If you do so find that ends the case. Your verdict should be for the defendant.

The importer insisted by his protest upon two grounds that the collector had made a mistake. He insisted, first, that these articles were enumerated under Schedule M of the tariff law, which provides,

among other things, for stones, freestone, granite, sandstone, and all building and monumental stone except marble, $1.50 per ton.

In so far as the protest pointed out a mistake, or an alleged mistake, on the part of the collector in not classifying these articles under this section, I have said in your presence and I say now that they were not specifically enumerated in the tariff law. That question has been the subject of investigation in this court, presided over by an able judge, and, so far as this tribunal is concerned, it is a question which cannot be opened for investigation.

51 So I say to you as matter of law that these articles were not enumerated and specifically named under the section of the statute to which reference has been made by the importer.

But in that protest they call the collector's attention (and it has been held for the purposes of this trial sufficient to raise the question) to what has been called the similitude clause of the tariff act, which provides:

"There shall be levied, collected, and paid on each and every non-enumerated article (and these were non-enumerated articles) which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty the same rate of duty which is levied and charged on the enumerated articles which it most resembles in any of the particulars before mentioned."

And it further provides that if it resembles two or more non-enumerated articles it shall pay the higher duty.

The district attorney, on behalf of the collector, calls the attention of the court and jury to another section of the statute which provides for duty upon marble, insisting that the imported articles most resemble marble of similar form and fashioned for similar purposes.

52 That section is "Marble, white statuary, brocalette, sienna, and verd-antique, in block, rough or squared, one dollar per cubic foot, and in addition thereto twenty-five per centum ad valorem; veined marble and marble of all other descriptions not otherwise provided for, in block, rough, or square, fifty cents per cubic foot, and in addition thereto twenty per centum ad valorem; sawed, dressed, or polished marble slabs and marble paving tiles, thirty per centum ad valorem, and in addition thereto twenty-five cents per superficial square foot, not exceeding two inches in thickness; if more than two inches in thickness, ten cents per foot in addition to the above rate for each inch *a* fractional part thereof in excess of two inches in thickness, but if exceeding six inches in thickness such marble shall be subject to the duty imposed upon marble blocks.

All manufactures of marble not otherwise provided for, fifty per centum ad valorem."

You will bear in mind what the issue in this case is. As has been said in other cases here, the burden is upon the plaintiff to show that the collector, in classifying under this section, made a mistake in the particulars pointed out by him in the protest. It is not sufficient, to sustain a verdict for the plaintiff, to show that the collector made a mistake, but it must be shown, and the

53 burden is upon the plaintiff to show, that he made the identical mistake—specific mistake—to which his attention was called by the protest, and it does not make out the plaintiff's case to say that the collector made another mistake or any number of other mistakes.

The question for you to determine is whether the collector should have classified these articles under the section that has been referred to in the protest because of their similitude to the articles therein enumerated, and if you find that they bear greater similitude to the articles enumerated in another section of the statute, then you should find for the defendant; and if you find that they bear equal similitude with the articles specified in some other section of the statute, then the burden has not been rolled off and the plaintiff's case has not been made out.

This question, under the similitude act, is submitted to you by reason of a decision which has been referred to—a late decision of the Supreme Court of the United States—the case of Fox *vs.* Arthur, 108 U. S., 125, where materials composed of cow's hair and cotton were held to bear a similitude to other materials composed of goat's hair and cotton. In that case the Chief Justice of the United States has said, speaking of this section of the statute: "If an article is found not enumerated in the tariff laws, then
54 the first inquiry is whether it bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated * * * as chargeable with duty. If it does, and the similitude is substantial, then, in the language of the Court in Stuart *vs.* Maxwell, it is deemed the same and to be charged accordingly. In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles."

So that under this decision of the Supreme Court it was the duty of the collector to look through the statute and ascertain, first, whether these articles were named specifically in any clause of the tariff act. If he found that they were not, the second inquiry was whether they were described under any general clause of the tariff act. If he found this inquiry also in the negative, then he was required to turn to the similitude clause and find whether they resembled substantially any article enumerated in the tariff. If he found that inquiry in the negative, then it was incumbent on him to collect the duty under the clause to which I have referred—the clause under which he did in fact collect it.

You will bear in mind that under the similitude clause the identity or the likeness must be similar in various particulars. "There shall be levied, collected, and paid on each and every non-
55 enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated" in the tariff.

It may be said, so far as this case is concerned, that the mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer. In other words, raw material may be so wrought upon or worked by the

hand of the artisan or the artist that it changes its character; that some other name will more properly and better describe it. It would hardly be proper to say that a block of marble when by the hand of the sculptor it has been transformed into a beautiful statue should come under this similitude clause because of its likeness to the raw material. Of a complicated machine, made wholly of steel, it could hardly be said that it bears a similitude to steel in a crude condition—as steel blooms or steel ingots. Even those deformed and distorted Cyprian images which occupy a neighboring room in this court-house—the "bearded Venus" and the "headless priest"—it would hardly do to say of them that because they are made of stone they should be—classified because of a similitude to stone as it comes from the quarry. In other words, as I stated to you, gentlemen, the work of the artisan, the mechanic, the artist, may change
56 the raw material so that some other name is applicable to it.

Take an illustration—an illustration which has been referred to by the counsel; assume that there is in the tariff act a duty imposed upon mahogany. Assume that another section imposes a duty upon black walnut chairs, desks, and so on, but the word "table" nowhere appears in the tariff act. The question would be whether there was a greater similitude between a mahogany table and a black walnut desk than between a mahogany table and mahogany. I only mention this as an illustration simply to show you the meaning which I desire to convey upon this subject.

This, gentlemen, is the only question for you to determine, whether there is a greater similitude between these articles which have been described, and about which there can be little doubt as to the manner in which they have been fashioned, and the articles mentioned in the section which has been referred to by the plaintiff, viz., stone, granite, freestone, monumental stones, than between them and other articles mentioned in the tariff. If you find that issue in favor of the plaintiff your verdict will be for the amount agreed upon, four thousand dollars.

If, however, you find that these articles or any portion of them, because there has been no evidence offered which would justify
57 the court in authorizing you to separate the various invoices more nearly assimilate to other articles mentioned in the tariff to which your attention has been called, or if you find that there is no substantial similitude between these articles and any other articles mentioned in the tariff, then your verdict should be for the defendant.

Because the collector correctly classified them if there was no substantial similitude between them and other articles mentioned in the tariff under the last section of the act.

Certain requests have been handed to the court to charge, and it is proper that I should say that I decline to charge further than I have already charged.

The following are the plaintiff's requests to charge hereinbefore referred to:

1. If the goods in suit or any of them are either granite, or

granite building stone or granite monumental stone the jury must find for plaintiff.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

2. If the jury find that the terms granite or building stone or monumental stone or either of them, according to their definition and use among those buying, selling, furnishing, and using such articles, include such articles prepared for use, then plaintiffs
58 *are* entitled to a verdict.

The court refused to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

3. That neither "granite," "building or monumental stone," are, in legal construction of the tariff, limited to any particular state or condition, and if the jury find the articles in suit are granite or building or monumental stone, whether the same be polished, cut to size, shape, or form, or fitted for ultimate use, their verdict must be for plaintiff.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

4. If the jury find that the goods in suit are non-enumerated articles in the tariff, then they must further find whether a similitude exists either in material, quality, texture, or the use to which they are to be applied between them and granite and all building or monumental stone; and if they find it to exist in either of these particulars, then the importations are to be classed for duty with the enumerated article that they most nearly resemble in either of these particulars according to the most exact likeness found to exist.

The court refused so to charge except as already charged,
59 and plaintiff's counsel then and there duly excepted to said refusal.

5. That, according to the true intent and purpose of the similitude rule in section 2499, Revised Statutes, non-enumerated articles must be classed for duty with articles enumerated for duty which are found to be the same or substantially the same either in material, quality, texture, and the use to which they are to be applied; and if such similitude exist the importations are not dutiable under section 2516, Revised Statutes.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

6. If the jury find the articles in suit to be granite in material or quality or texture or the use to which it is to be applied, and that they are not otherwise enumerated or provided for for duty in the tariff, then they cannot find them to be non-enumerated articles manufactured in whole or in part.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

7. That whether or not the articles in suit are granite or building stone or monumental stone is under the evidence a question of fact for the jury under the instructions of the court, and not solely a question of law to be decided by the court.

60 The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

8. That in considering whether the articles in suit are building stone or monumental stone the jury are to consider from the testimony whether they were so known in the trade and commerce of the country at the date of the passage of the tariff act of 1870, and, if they find they were, then plaintiff is entitled to a verdict.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

9. That as it is conceded that the articles in suit are granite, and as it appears by uncontradicted testimony that they are so known to the trade and have been for many years before and ever since 1870, the jury must find for the plaintiff.

The court refused so to charge except as already charged, and plaintiff's counsel then and there duly excepted to said refusal.

At the conclusion of said charge, and before the jury retired to consider of their verdict, the plaintiff's counsel, having then and there specifically and separately excepted to the refusals of the court and each of them to charge the jury each and every request
61 separately, as hereinbefore requested of the court, also then and there separately excepted to each of the following separate portions of the charge as given, viz:

First. Holding that the jury may find that the articles in suit are non-enumerated manufactured articles, and that if they so find that ends the case and they must find for the defendant, to wit:

"You may find, gentlemen, upon this proof that these articles were covered by this section of the statutes—that is, that they were manufactured articles not before provided for either directly or by similitude to other articles mentioned in other portions of the statute. If you so find that ends the case; your verdict should be for the defendant."

Also that as matter of law the articles in suit were not specifically enumerated and provided for in the law as granite and building stone and monumental stone, to wit:

"I have said in your presence and I say now that they were not specifically enumerated in the tariff law." "So I say to you, as matter of law, that these articles were not enumerated and specifically named under this section of the statute, to which reference has been made by the importer," viz., stones, granite, and all building and monumental stone.

62 Also that the mere identity of the material of the imported goods with that mentioned in the statute as granite, &c., is not of itself necessarily sufficient to place the article under that

clause, to wit: "You will bear in mind that under the similitude clause the identity or the likeness must be similar in various particulars. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any article enumerated in the tariff.

"It may be said, so far as this case is concerned, that the mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer."

Also that where a new name arises for an article that may cause a difference in classifying it under the similitude clause, to wit: "In other words, raw material may be so wrought upon or worked by the hand of the artisan or the artist that it changes its character, that some other name will more properly and better describe it." "In other words, as I stated to you, gentlemen, the work of the artisan, the mechanic, the artist may change the raw material so that some other name is applicable to it."

63 Also that if the jury find that any portion of these articles were nearly assimilate to some other dutiable article than granite or building or monumental stone that the verdict should be for the defendant, to wit: "If, however, you find that these articles or any portion of them, because there has been no evidence offered which would justify the court in authorizing you to separate the various invoices more nearly assimilated to other articles in the tariff to which your attention has been called, or if you find that there is no substantial similitude between these articles and any other articles mentioned in the tariff, then your verdict should be for the defendant."

The request of the plaintiff's counsel being that in case the jury found differences to exist between the articles in suit that in that event the jury should be directed to find, specially so, that under the stipulation as to the adjustment of the amount of the verdict under the direction of the court a special judgment could be entered.

The jury, having been sworn, thereupon retired and afterwards returned with a verdict for the defendant.

And inasmuch as the foregoing matters of fact and of law and the said several exceptions so offered and made to the opinions, instructions, and decisions of the court do not otherwise appear

64 upon the record of the trial, therefore, on the prayer of the plaintiff, by his counsel, the said judge has signed the foregoing as and for the bill of exceptions in this cause, *nunc pro tunc*, and as for 13th day of December, 1883, and of the October term aforesaid, and directed the same to be filed accordingly.

ALFRED C. COXE. [SEAL.]

65 [Endorsed:] U. S. circuit court, southern district N. Y. John M. Moffitt *vs.* Chester A. Arthur. Plaintiff's proposed bill of exceptions. Hartley & Coleman, plaintiff's attorneys, 62 Wall street, N. Y. city. U. S. circuit court. Filed Dec. 18, 1884. Timothy Griffith, cl'k.

66 Supreme Court of the United States, of October Term, 1886.

JOHN M. MOFFITT, Plaintiff in Error,

v.

CHESTER A. ARTHUR, Defendant in Error.

Afterwards, to wit, the second Monday of October, in the same term, before the justices of the said Court, at the Capitol in Washington, comes the said plaintiff in error, by Hartley & Coleman, his attorneys, and says that in the record and proceeding aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgement aforesaid, in form aforesaid given, was given for the said defendant in error, Chester A. Arthur,
67 against the said plaintiff in error—

Whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid may be reversed, annulled, and altogether held for nothing, and that the said plaintiff be restored to all things which he has lost by occasion of said judgment, &c.

HARTLEY & COLEMAN,
Attorneys for Plaintiff in Error.

Endorsed: Circuit court of the U. S. October term, 1886. John M. Moffit *v.* Chester A. Arthur. Assignment of errors. To Stephen A. Walker, U. S. att'y, for d'f't in error. Due service of
68 a copy of the within is hereby acknowledged this 27th day of July, 1886. Stephen A. Walker, attorney for def't in error. Hartley & Coleman, att'ys for pl'ff in error, 62 Wall St., New York city. U. S. circuit court. Filed July 27th, 1886. Timothy Griffith, cl'k.

69 Supreme Court of the United States. October Term, 1886.

JOHN M. MOFFIT, Plaintiff in Error,

v.

CHESTER A. ARTHUR, Defendant in Error.

In error.

And afterwards, to wit, on the second Monday of October, in the same term, the said Chester A. Arthur, defendant in error, by Stephen A. Walker, U. S. attorney, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgement aforesaid; and he prays the said Supreme Court may proceed to examine before the justices thereof now here as well the record and proceedings aforesaid as the matter aforesaid above assigned for error, and that the
70 judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the U. S. October term, 1886. John M. Moffitt *v.* Chester A. Arthur. Joinder in error. To Hartley & Coleman, att'ys for pl'ff in error. Due service of a copy of the within is hereby acknowledged this 27th day of July, 1886. Hartley & Coleman, pl'ff's att'ys. Stephen A. Walker, U. S. att'y, for def't in error, post-office building. U. S. circuit court. Filed July 27, 1886. Timothy Griffith, cl'k.

71 U. S. Circuit Court, Southern District of New York.

JOHN M. MOFFIT
v.
CHESTER A. ARTHUR. } No. 4727.

And now comes the above plaintiff, by his attorneys, Hartley & Coleman, and shows the court that the amount of the judgment herein in favor of the defendant, as appears by the judgment roll, is sixty-two $\frac{35}{100}$ dollars; that the plaintiff proposes to sue out a writ of error herein to remove the cause to the U. S. Supreme Court, where, according to the rules of said Court, security must be given by him for the costs of said Court, and where, in the regular order of business, it will be heard and determined in less than three years.

72 Wherefore he proposes to pay into the registry of this court the sum of one hundred dollars as sufficient security to the defendant that he will prosecute his said writ of error to effect and will pay all damages and costs if he fails to reverse the judgment aforesaid, said sum of one hundred dollars to be hereafter paid out upon the order of the court as it may be found due. Now, therefore, it is ordered that such payment into the registry of this court shall be good and sufficient security upon said writ of error and the citation thereunder.

ADDISON BROWN, *Judge.*

I consent.

S. A. WALKER,
U. S. Att'y & Att'y for Def't.

73 Received into the registry of this court from the plaintiff in this action one hundred dollars, in accordance with the foregoing order.

Dated New York, July 9, 1886.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed: U. S. circuit court, south. dist. of New York. J. M. Moffitt *v.* C. A. Arthur. Order. Hartley & Coleman, pl'ff's att'ys, 62 Wall St., New York city. U. S. circuit court. Filed July 13th, 1886, Timothy Griffith, clerk.

74 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John M. Moffitt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, July 13th, 1886.

ADDISON BROWNE.

75 [Endorsed:] E. & A. A. 613. 4727. U. S. Supreme Court John M. Moffitt, plaintiff in error, against Chester A. Arthur, defendant in error. Citation. U. S. circuit court. Filed Jul. 14, 1886. Timothy Griffith, clerk.

Due service of a copy of the within is hereby acknowledged this 14th day of July, 1886.

STEPHEN A. WALKER,
U. S. Att'y, for Def't in Error,
Per R.

Endorsed on cover: S. New York C. C. U. S. No. 317. John M. Moffitt, plaintiff in error, *vs.* Chester A. Arthur, late collector of the port of New York. Filed August 16, 1886.

P. F. McBREEN, Law and Job Printer, 61 Beekman St., N. Y.

Office Supreme Court, U. S.
FILED.
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.—No. 54.

JOHN M. MOFFIT,
Plaintiff in Error,

against

CHESTER A. ARTHUR,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error imported in 1875, at New York, from St. Johns, New Brunswick, three cargoes of Red Granite, and under the Revised Statutes then in force, the defendant collected a duty thereon of 20 per cent. ad valorem, as a "manufactured article not enumerated nor provided for" in the tariff schedules. Plaintiff paid this rate, protesting that the importations were "granite, building stone and monumental stone," dutiable by enumeration under Schedule M, Title 33, U. S. Rev. Stats., at $1.50 per ton, or by similitude thereto, under R. S., Sec. 2499.

The following facts, collected from the testimony bear on the meaning and true interpretation of the Statute. Usually when a granite structure is to be erected, the plans and specifications are prepared, and advertisements are issued for proposals to furnish the granite of which it is to be built. Proposals are

received from contractors or quarrymen engaged in furnishing granite. Contracts are made with them, and they use the plans and specifications in the construction. The plans designate certain shapes, and the material is cut to conform thereto. The particular style of finish is designated in the specification, and must be described therein, whether rough, worked or polished. If a quarry face is wanted, or a crandelled face, &c., each must be separately specified. If the material is desired to be in the rough, you must say so. All must be specified in detail. When speaking of these altogether—*i. e.*, generally, you speak of them so as to describe the material. If the material is granite, that is the proper term to describe them by in general. No matter what its stage of finish, it does not change its name, from the time it is in the quarry until it goes into the building. This is the general custom throughout this country and in Europe. It is always called granite, if the material is granite, without regard either to the style of finish or the shape of the pieces, or any thing of the kind. In the use of the word granite there is no limitation in general as to its condition.

Granite is an expensive stone, and is generally quarried in dimensions as near as possible to those in which it is to be used, and that is the condition in which it leaves the quarry. Before the stone is taken out of the quarry you have the plan and mind of the architect and designer, because you have the stone quarried in the nearest dimensions in the rough to make it work to the perfect shape.

Red granite, imported into this country, is mostly polished, usually cut, and not rough.

Monuments leave the hands of the granite cutter generally as completed parts, sent separately to the place where they are to be put up. What is sold is only in pieces. A base is a necessary part of a monument.

The granite business includes monumental and fitting work — the building of monuments and buildings, and the cutting of building stone. Also, the setting of stones and monuments. The people setting the stone are granite setters, or brown stone setters, &c., according to the kind of stone they set, and the condition of the stone so set is a finished condition.

The term "building stone," as used throughout the United States, in the stone trade and among architects and others, means any stone available for building, whether cut or uncut. A granite column is necessarily a building stone. The building

could not stand up without it. A column is composed of a capital, a base and a shaft.

Articles described as shafts, dies, parts of monuments, &c., fall under the common and accepted definition of monumental stone, if they were intended for monumental use. They might also be called dimension stone or monumental stone, and they would also be included under the term granite.

The meaning of building stone in trade and commerce is, any stone that is available for building. (Fol. 36.)

The plaintiff's importations were all granite, and were known under that general class and name. (Fol. 30.)

They were divided into two subordinate classes.

1st. Building stone, and 2nd, Monumental stone, and the labor bestowed on them was only such as to fit them for those uses.

1st. The Building Stone.

There was partly cut and partly hammered granite, such as ashlar, which had the surface cut or polished, for insertion into the walls of the exterior or interior of a building, and to be cut and trimmed on the ground.

Panels that differed from rough granite simply in one face being polished and the rest all rough--beds, joints and backs left with the quarry face. After importation and before the panel is put up in its place, the beds and joints must be worked, and frequently the back of the ashlar must be cut to make it fit in position. The stone must be fitted to the emergency of the building.

The remaining building stone comprised such articles as pedestals for the columns of the Philadelphia public building to rest upon.

Polished ashlar panels for the same building.

Polished columns for the front of the Dimes Savings Bank Building in New York City These required to be bottomed and top-jointed, and sometimes recut. The engraving is always done here. They are bought by the cubic foot, which is substantially by weight, and is the way the weight is got at. Granite will vary from 174 to 176 pounds per cubic foot. The value is got at by the cubic measurement.

There were also articles called sundries, that came in a somewhat rough state and were to be cut when they came here ; part were polished and part hammer cut.

They were for the enclosure of a flower parterre, similar to a fountain in the Capitol grounds in Washington, and were moulded and polished, but to a certain extent were to be re-cut at the Capitol at Washington.

Others of the sundries were for pedestals for the standard lamps in the Capitol grounds in Washington. They were in sections and to be fitted to other stone, other material. Others were for granite curbs.

The specific purposes to which all of these articles were to be applied, were for buildings and outside structures or interior construction.

2nd. The Monumental Stone, comprised such articles as—Two cases containing a tomb. The design consisted of three pieces, for one of which a native granite was used and the other two pieces were imported.

Also a list of small monuments and unrelated parts of monuments. They were in all cases incomplete; they were invariably deficient in the lower part or base of domestic stone, and were to be completed and in some cases the lower base recut. They were not complete when they arrived here.

The Customs Examiner testified: (Fol. 44.)

I am an examiner in the appraisers' department of the New York Custom House, and examined and passed these importations.

They are called polished granite and are named with specific names, as pedestals, columns, tombs, monuments, &c. They all appeared to us to be the same thing in fact—polished granite, and were classified under one head as non-enumerated articles, because we considered it as a fact that the manufacture was the chief value of the goods—seventy-five or eighty per cent., I believe. The various imported pieces each came in a separate box. It is customary to have a base of American granite. (Fol. 45.)

The articles in these importations that I have called monuments, consisted of polished pieces of granite.

I cannot say what portion of the pieces were there, or how many monuments they were to compose when made up. There were no bases. What each piece was to go with, I cannot say. My impression is that there were some complete monuments without bases.

Facts as to Similitude.

Marble and granite are different in material. Marble is limestone, granite is feldspar, hornblende &c.; granite is much stronger than marble and more powerful in resisting crushing strains. New Brunswick granite is red. There are red marbles, but not so desirable to use outside as granite, as they do not stand the weather. Marble is softer and easier worked than granite, and is not so expensive. Marble is used for furniture, table tops, counters, butchers' and plumbers' slabs, for which purposes granite is not used.

A witness for defendant testified. (Fol. 44.) There is some marble that in appearance when finished, in a measure somewhat resembles Bay of Fundy granite, but I would not suspect it to be that granite. In texture, there is some marble that has a vague sort of resemblance to Bay of Fundy granite, not near enough to be mistaken one for the other. Marble went out of fashion for monumental and building purposes, because of its perishable nature, it would not stand exposure to the elements. Red granites were used for their color. You could not use marble to produce the effect. Red granite is used in building to produce the artistic effect of color and for strength.

Another witness for the defendant testified : (Fol. 45.)

The only resemblance that I think of between the rough granite in the invoices, and the polished granite, was in the texture. These articles were all made from the natural granite. The same goods could not be made of marble—the texture would not be there.

If a man wanted a Scotch granite monument, he would not be satisfied with a marble monument. Granite is the only thing that is lasting under exposure to the weather. The polish on granite will last hundreds of years, that on marble soon disappears, and in cemeteries, &c., it becomes stained.

Another testified : (Fol. 47.)

The material of the rough granite and the polished granite is the same. The use of rough granite is to be made up for buildings and monumental purposes. The texture of rough granite and monumental granite are both the same.

Statutes to be Considered.

Tariff Act, Mar. 2, 1861, Sec. 19, 12th Stats. p. 187, imposed a duty of 10 per cent. on "building stones."

Int. Rev. Act., July 1, 1862. Sec. 75, 12th Stats. p. 466, imposed "on all manufactures of cotton, &c., &c. * * * and other materials not in this Act otherwise provided for, a duty of three per cent. ad valorem * * provided further that * * brick, lime, Roman cement, draining tiles, marble, slate, building stone, * * * shall not be regarded as *manufactures* within the meaning of this Act."

Tariff Act, July 14, 1862, Sec. 6, 12th Stats., p. 549, levied an additional duty of 10 per cent. ad valorem on "building stone of all descriptions not otherwise provided for."

(In neither of the tariff Acts of 1861 nor 1862 was there any other provision for granite or building stone which thus paid a duty down to 1870 of 20 per cent. ad val. upon importation from abroad.)

Int. Rev. Act, June 30, 1864, Sec. 94, 13th Stats., p. 267. "On slate, freestone, sandstone, marble and building stone of any other description when dressed, hewn or finished, a duty of 3 per cent. ad valorem, provided that the cost for the erection, fitting, adjusting or setting building stone of any description shall not be included in the assessment of any duties thereon."

"On marble and other monumental stones with or without inscriptions, 5 per centum ad valorem. Section 95, same Act, 13 Stats. p. 272, exempts from tax "marble and slate or other building stones in block, rough or unwrought."

Int. Rev. Act, July 13, 1866, Sec. 10, 14th Stats., p. 148, exempts from tax "building stone of all kinds, including slate, marble, freestone, soapstone, and rock and ground gypsum," and also exempts monuments of stone of all kinds not exceeding in value the sum of One hundred dollars.

Tariff Act, July 14, 1870, Sec. 21 (16th Stats., p. 264)., which was an act in its scope and title to reduce duties, provided that in lieu of the duties now imposed (viz : 20 per cent. by Acts of 1861 and 1862), on the articles hereinafter enumerated or provided for, there shall be levied, &c. :

"On rough or unfinished grindstones, $1.50 per ton."

"On finished grindstones, $2.00 per ton."

"On freestone, sandstone, granite and all building or monu-
"mental stone, except marble, $1.50 per ton."

(Marble building stone and marble monumental stone having thus been excepted from this paragraph, specific provisions for such marble, depending on thickness, finish, &c., next follow, viz :)

"On all sawed, dressed or polished marble, marble slabs and "marble paving tiles, thirty per centum, ad valorem, and in "addition twenty-five cents per superficial foot, not exceeding "two inches in thickness; if more than two inches in thickness, "ten cents per foot in addition to the above rate for each inch "or fractional part thereof in excess of two inches in thickness. "Provided, that if exceeding six inches in thickness, such mar- "ble shall be subject to the duty now imposed on marble in "blocks."

Sawed, dressed and polished granite not being excepted, paid $1.50 per ton, and the 20 per cent. provisions of earlier Acts were pro tanto repealed.

The Revised Statutes of 1874, Sched. M, of Sec. ~~5203~~ 2503 re-enacted the provisions of the Act of 1870, as follows : "Stones, freestone, granite, sandstone, and all building or monumental stone except marble, $1.50 per ton."

The marble provisions are also found in the same schedule, commencing with marble, white statuary, &c., in block, rough or squared and sawed, dressed or polished marble. Under the revision our importations were made.

And now, as illustrative only, we cite the Act of March 3, 1883, passed subsequently to our importations, to show the necessity of different language from that of the revision for sustaining a duty of 20 per cent. on such goods. (22 Stats, p. 514.) "Stones (unmanfactured or undressed), freestone, granite, sandstone and all building or monumental stone except marble (not specially enumerated or provided for in this Act, $1 per ton, and upon stones as above, hewn, dressed or polished, twenty per centum, ad valorem). The new matter we have enclosed in brackets. Here granite and all building or monumental stone are by the use of necessary adjectives and qualifying words divided into classes of unmanufactured or undressed, and further under the description of "stones as above," again divided into hewn, dressed or polished at a different rate of duty, viz : 20 per cent. ad valorem.

The Errors assigned are:

I.—The ruling of the Court (Record fol. 41) that he should refuse to submit to the jury the question on enumeration and the evidence thereon.

Refusing to charge the jury, page 24—That whether or not the articles in suit are granite or building stone or monumental stone is, under the evidence, a question of fact for the jury, under the instructions of the Court, and not solely a question of law to be decided by the Court.

In charging the jury "I have said in your presence and I say now, that they were not specifically enumerated in the tariff law.

"So I say to you, as matter of law, that these articles were not enumerated and specifically named under this section of the statute to which reference has been made by the importer, viz: stone, granite and all building and monumental stone.

Also refusing to charge the jury, page 23—

If the jury find that the terms granite, or building stone or monumental stone, or either of them, according to their definition and use among those buying and selling, furnishing and using such articles, include such articles, prepared for use, then plaintiff is entitled to a verdict.

Also in refusing to charge the jury "That in considering whether the articles in suit are building stone or monumental stone, the jury are to consider from the testimony whether they were so known in the trade and commerce of this country at the date of the passage of the tariff Act of 1870, and if they find they were, then plaintiff is entitled to a verdict.

Also in refusing to charge the jury "That as it is conceded that the articles in suit are granite and as it appears by uncontradicted testimony that they were so known to the trade and have been for many years before and ever since 1870, the jury must find for the plaintiff.

II.—In ruling as matter of law at the close of plaintiff's case that polished granite is not included under the statutory enumerations of granite, or building stone or monumental stone. (Record fol. 41.) Refusing to charge the jury that if the goods in suit or any of them are either granite or building stone or monumental stone, the jury must find for plaintiff, Record fol. 57, and refusing to charge the jury that neither "granite"

"building or monumental stone" are in legal construction of the tariff limited to any particular state or condition, and if the jury find the articles in suit are granite, or building or monumental stone, whether the same be polished, cut to size, shape or form, or fitted for ultimate use, the verdict must be for plaintiff.

III.—In refusing to charge the jury–

That "If the jury find that the goods in suit are non-enumerated articles in the tariff, then they must further find whether a similitude exists either in material, quality, texture or the use to which they are to be applied between them and granite, and all building or monumental stone, and if they find it to exist in either of these particulars, then the importations are to be classed for duty with the enumerated article that they most nearly resemble in either of these particulars, according to the most exact likeness found to exist. (Record, p. 23.)

Also "That according to the true intent and purpose of the similitude rule in Section 2499, Revised Statutes, non-enumerated articles must be classed for duty with articles enumerated for duty which are found to be the same or substantially the same, either in material, quality, texture or the use to which they are to be applied, and if such similitude exists, the importations are not dutiable under Section 2516 Revised Statutes. (Ibid.)

Also in charging the jury, page 25—

You will bear in mind that under the similitude clause the identity or the likeness must be similar in various particulars. There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture or the use to which it may be applied, to any article enumerated in the tariff. It may be said, so far as this case is concerned, that the mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer.

Also in charging the jury—

In other words, raw material may be so wrought upon or worked by the hand of the artisan or the artist, that it changes its character, that some other name will more properly and better describe it. In other words, as I stated to you, gentlemen, the work of the artisan, the mechanic, the artist, may change the raw material so that some other name is applicable to it.

Also in refusing to charge the jury, page 23—

If the jury find the articles in suit to be granite in material, or quality, or texture, or the use to which it is to be applied, and that they are not otherwise enumerated or provided for for duty in the tariff, then they cannot find them to be non-enumerated articles manufactured in whole or in part.

IV.—In ruling, at the close of plaintiff's testimony, that as matter of law the importations in question were manufactured articles. Folio 41.

Also, in charging the jury (fol. 61), You may find, gentlemen, upon this proof, that these articles were covered by this Section of the Statutes—that is, that they were manufactured articles not before provided for, either directly or by similitude, to other articles mentioned in other portions of the Statute. If you so find, that ends the case. Your verdict should be for the defendant.

POINTS.

I.

The evidence that the articles were generally known in the trade and commerce of this country among persons dealing in and using them under the names mentioned in the statute, viz., granite and building or monumental stone, should have been submitted to the jury.

II.

As a matter of statutory construction, the importations were enumerated for duty under the description of granite, and all building or monumental stone except marble, and the jury should have been so directed, or the evidence submitted to them with proper instructions.

III.

Under the Similitude law (a) identity, either in material, quality, texture, or the use to which it may be applied, is the

most absolute likeness that can exist. (b) If that identity be found in only one of those particulars, that is sufficient to establish a statutory similitude, and if identity further concurs in more or all of the remaining particulars mentioned in the Statute, although one is sufficient, the force of the similitude is correspondingly increased.

(c) Similitude based not on identity in the foregoing particulars, but near or close resemblance therein, while sufficient, in the absence of identity, to establish the statutory similitude, establishes it in a minor degree, and the classification must be made according to the most exact likeness found to exist in the statutory particulars, or either of them, identity being the most exact. (d) Among the statutory particulars, that of "material" comes first, and the first inquiry should be, is the article in dispute identical in material with the enumerated article? If so, that should generally be sufficient, and was so in this case. Identity in the other statutory particulars also existed.

(e) The name of the imported article, if it is non-enumerated in the tariff, is a matter of no consequence one way or the other in establishing the statutory similitude, which is confined to "material, quality, texture and use," not name.

IV.

The articles were not dutiable as non-enumerated, manufactured articles, under any aspect.

ARGUMENT.

I.

The first ground of error is that the Court withheld from the jury plaintiff's evidence, showing that the imported articles were known in the commerce of this country by the words or terms used in the Statute, to wit: granite and all building or monumental stone, refusing to submit that question to the jury, and charging them as matter of law, that plaintiff's importations were not enumerated by those terms.

If evidence was offered competent to sustain this issue, the error assigned is clear.

In Lawrence vs. Allen, 7 How., 797, this court said :

"In several analogous cases as to teas, cotton bagging, and "sugar, this Court has held that it is a proper fact for the jury "to decide, whether the imported article is or is not known in "commerce by the words or terms used in the tariff imposing "the duty, and not a question of law to be settled by the court "as was done here." Then follows the citation of the authorities up to that time, 1848.

Again in 1875, this Court in Tyng vs. Grinnell, 92 U. S., 470, recapitulated its decisions on this point and said :

"Suffi e it to say without multiplying authorities, that the "rule of law is settled, that the question whether an imported "article is or is not known in commerce by the word or terms "used in the act imposing the duty, is a question of fact for "the jury and not a question of construction." And such is the law to-day.

In Robertson vs. Salomon, decided at the last term of this Court, it is said, 130 U. S., 415 : "The court told the jury, that "the commercial designation of the article, or what the article is "called in trade and commerce, or the name bean, has nothing to "do with the question. We think the court erred in this in- "struction. The commercial designation, as we have frequently "decided, is the first and most important designation to be ascer- "tained in settling the meaning and application of the Tariff laws. "See Arthur vs. Lahey, 96 U. S., 112, 118 ; Barber vs. Schell, 107 "U. S., 617, 623 ; Worthington vs. Abbott, 124 U. S., 434-436 ; "Arthur's Executors vs. Butterfield, 125 U. S., 70-75. But if the "commercial designation fails to give an article its proper place "in the classifications of the law, then resort must necessarily "be had to the common designation.

"We think, therefore, that the court erred both in its charge, "and in the exclusion of the evidence offered ; especially as "without any evidence, and with the common knowledge which "we all possess, the court might almost have been justified in "directing a verdict for the defendant."

Admitting the nature and force of this rule what was the excluded testimony?

It was remarkable in quality, precision and disinterestedness, and entitled to the highest probative character. Mr. Richard M. Upjohn is an architect of national reputation. Mr. J. J. R. Croes, a civil engineer, one of the Directors of the American Society of Civil Engineers, and the plaintiff Mr. Moffitt, a monumental sculptor and granite dealer, widely and favorably known. As to the quality of this evidence, the Court will notice that architects and civil engineers are best qualified to testify about stone. Their professions are practical ones. They build throughout the country. Their knowledge and daily experience are more comprehensive and varied than those of any one quarryman, or stone cutter, or mason, or contractor. They deal with many business men of these classes in different parts of the United States, and must know more than each of these classes.

They select, plan and draft every stone in the structure, prepare the specifications, advertise for proposals, receive the bids, award the contracts for quarrying, dressing and setting the stone, superintend their execution, certify the vouchers for payment, and deliver the completed building to the owner.

Without full, accurate and general knowledge of the trade, commercial and professional nomenclature throughout the country, of the stone they buy and use, they would lack the rudiments of professional learning and of practical success.

They purchase and build for others than themselves, and are disinterested in this controversy.

When, therefore, they testified as they did, that all these importations were known in the trade and commerce of this country among dealers and all having to do with them, all as granite, and a part as building, and another part as monumental stone; that these were the correct terms applicable to the articles, what possible lawful excuse was there for ignoring the testimony, and withholding it from the jury?

As their testimony was excluded under plaintiff's exception taken at the trial, it is rightfully incorporated in the Bill of Exceptions, and we ask the Court to read it. See Record, p. 9, fol. 27 to 40.

The plaintiff, a granite dealer. testified, Record, fol. 30.

"These goods were 'granite' as that term is known and generally used."

Mr. Upjohn testified, Record, fol. 33-4, that he was an architect of thirty years' practical experience. "I heard Mr. Moffitt's description of these different cargoes imported by him. Granite was the proper term to describe them by in general. I never heard granite spoken of otherwise than as granite. No matter what its stage of finish is it does not change its name from the time it is in the quarry until it goes into the building. That is the only way I ever knew it to be described. I know this to be the general custom throughout this country and in Europe. It is always called granite, if the material is granite, without regard either to the style of finish or the shape of the pieces or any thing of the kind. I never heard any other idea broached.

Q When the term "building stone" is used throughout the United States, in the stone trade and in your profession among architects, and all those people, what does it mean?

A. It means any stone available for building.

Q. Whether it is just ready to put into the building, or at any prior time?

A. Yes, it means any stone available for building, whether cut or uncut.

Some buildings are largely monumental in their character such, for instance, as the New York Custom House, or the Post Office Building, and the stones that are used are monumental stones, depending on their size. If you are building a monumental building—monumental stone is necessary to sustain it.

The articles imported in this case, described by Mr. Moffitt as shafts, dies, parts of monuments, &c., fall under the common and accepted definition of monumental stone, if they were intended for monumental use. They might also be called dimension stone or monumental stone, and they would also be included under the term "granite."

And on his cross examination, fol. 36:

The meaning of building stone in trade and commerce is any stone that is available for building. I don't know that the ordinary meaning is any different.

Mr. Croes, a civil engineer of twenty-five years' experience, testified, fol. 37.

The importations in this case described in detail as building work for the Dimes Savings Bank, &c.—shafts, ashlar, ashlar for spandrels, &c., are known in the engineering profession and among contractors and people who buy, sell and use them, under the general name of building stone and also as granite.

Q. Is it or is it not true that there is in the use of the term granite as a general term, any qualification, implied or otherwise, restricting that term to any stage of preparation or finish of the article?

A. In the use of the word granite, there is no limitation in general as to its condition.

Then he speaks of the details of the specifications and concludes "but all come under the general classification of granite."

Like question and answer as to building stone.

"My experience has been general and the facts stated as to the general meaning and use of the terms are those which generally obtain throughout the country."

And on cross-examination:

"Any thing is building stone which is essential to hold the building up and is so generally known and called.

This testimony is not only uncontradicted, but as the Court assumed to exclude it, the truth of such testimony must for the purpose of such decision be admitted, together with all the conclusions the jury might rightfully have drawn from it.

II.

The Court erred in holding that as matter of law the Statute did not enumerate under the term stones, granite and all building or monumental stone except marble, the importations of the plaintiff.

It is noteworthy in this case that the Court fails to define the meaning of the Statute, contenting himself with ruling that plaintiff's goods "were not specifically enumerated in the tariff law," although he had just described them as "New Brunswick *granite* in the shapes and forms that have been described to you."

As far, however, as his meaning can be gathered from the record, it is that the words of the Statute were limited to granite which had not been subjected to manipulation, polishing or hammering, to bring it to shapes and forms fit for its intended purpose.

But any such limitation is erroneous, because general terms were necessarily and purposely used by the legislature to carry out an exactly contrary intention, and we shall show from the Statutes a legislative usage to this effect, whereby the plaintiff's importations were, as a matter of statutory construction, clearly enumerated under the terms granite and all building or monumental stone.

When Congress uses general terms alone, particular qualifications and limitations are not to be presumed, for when it intends to limit its import to crude or unmanufactured articles it says so.

Of many instances in the Revised Statutes a few will illustrate.

Agate unmanufactured, asbestos not manufactured, asphaltum, and bitumen crude, brimstone crude, burrstone in blocks, rough or unmanufactured and not bound up into millstones, chalk and cliff stone unmanufactured, and so on through the free list. In Schedule M, we find albata unmanufactured, 30 per cent., antimony crude and regulus of 10 per cent. And so on.

General terms are necessities of the language. Was not granite or building stone properly descriptive of these imported articles? To describe them as caps, dies, plinths, shafts, &c. in the tariff acts would be foolish and impracticable, because the architectural shapes and purposes of stone are so numerous, and the style of finish so varied, giving rise to different names for practically the same thing, that Congress would only encumber the statute book with a mass of details, lost in which, their intention would be defeated by unavoidable omissions.

For instance, Worcester defines "Ashlar:" 1. Common freestones as they are brought, rough and chipped, from the quarry.--Brande.

2. Facings made of squared stones on the front of buildings, hewn stone for facing. Ashlar is said to be plane when it is smoothed, tooled when it is wrought into regular flutes, random-tooled when cut without regularity, chiselled or boasted when wrought with a narrow tool, pointed when wrought with

a tool still narower, rusticated when the grooves are sunk by cutting off the arrises or angles of the stone, and prison rustic when fitted into deep holes.—Francis.

Here, besides rough ashlar, are seven varieties of finished ashlar, and if Congress had specified "ashlar," there would have been the same argument for limiting that term by implication, as for limiting building stone or granite by implication in this case. In short, upon the defendant's theory of statutory construction, Congress would be defeated in its intention of making one general, comprehensive rate, where it did not from choice or necessity enter into particulars, using general terms only to accomplish a general purpose.

In the tariff Act of July 14, 1862, Sec. 6, 12th Stats., 549, the term was "building stone of all descriptions." Is there any doubt that finished stone, ready to be hoisted up to its place in the wall of a building, there to be set by the mason or stone setter, is building stone of some description? It may be marked and numbered (A. 49), or (C. 75), or designated on the plan as caps, sills, ashlar, &c., but it is in common speech, and that of the statute, building stone.

The work on it has made it building stone, instead of paving stone or monumental stone, and the work that has made monumental stone has distinguished that from building stone. Only by shape and finish can monumental stone be distinguished from building stone, and, as the law contemplated a distinction by separate mention of each, consequently it contemplated the workmanship necessary for creating that distinction.

Coming now to the legislation of June 30, 1864, Sec. 94 13, Stats. 267, we find here that the words, "Slate, freestone, sandstone and marble," are defined as including "building stone," because the Statute says, "and building stone of any other description;" therefore "marble," for instance, here includes marble building stone—not that all marble is building stone, but such marble as by proper workmanship is building stone, falls under the head of "marble" as a proper, general descriptive term.

Next we notice that the taxable portion of marble here is only that which is further described as "when dressed, hewn or finished," and this latter, finished building stone, continues to be, and to be called building stone, until it forms part of the building, and ever afterwards, for the proviso says, "provided that the cost for the erection, fitting, adjusting or setting build-

ing stone of every description shall not be included in the assessment of any duties thereon."

All these exempted elements of value, viz., "erection, fitting, adjusting and setting," are those which *follow the finishing of the stone*, so that "building stone of any description" must refer to and embrace building stone entirely finished by hammering, polishing, &c., entitled to their appropriate specific architectural names, and ready *to be* erected, fitted, adjusted and set.

In the next paragraph "marble" again appears as inclusive of monumental stone—*i. e.*, marble cut in such shape and with such finish as to show that it is not marble building stone. The words "with or without inscriptions" refer directly to finished monuments, for the inscription is the final dedication to use, and yet they are enumerated, not as monuments, but as monumental stones.

Referring again to Building Stone, it will be seen that the dutiable portion is described as "dressed, hewn or finished," and the exempt portion is described in Sec. 96 page 272, as "marble and slate, or other building stones, in block, rough or unwrought." If the theory of the government is correct, these words, "in block, rough or unwrought," are superfluous.

But in view of the testimony in this case and of the other statutes, we see how necessary they were, unless all building stone was to be exempted, which was not the purpose. When we come to the repealing act of July 13, 1866, Sec 10, 14 Stats. 148, where only one object was to be accomplished, we find the repealing term is "building stone of all kinds, including slate, marble, freestone and soapstone, and rock and ground gypsum."

Here "building stone of all kinds" included absolutely "dressed, hewn and finished" building stone, because that only was taxable, and only that tax existed to be repealed—building stone in block, rough or unwrought was already free *eo nomine*.

No difference will be found between this term here, "Building stone of all kinds," and "all building stone," in the next subsequent Act of 1870, so far as granite is concerned, and if "building stone of all kinds" includes that which is "dressed, hewn and finished," in the Acts of 1864 and 1866, so does "all building stone," in the Act of 1870, include "dressed, hewn and finished" granite for building purposes.

In the Tariff Act of July 14, 1870, Sec. 21, 16 Stats., 264, which repealed the Tariff Act of 1862 on Building stones, the provisions are:

On rough or unfinished grindstones, $1.50 per ton; on finished grindstones, $2.00 per ton.

On freestone, sandstone, granite, and all building or monumental stone, except marble, $1.50 per ton. On all sawed, dressed or polished marble, marble slabs and marble paving tile, a compound duty, with the proviso that if exceeding six inches in thickness such marble shall be subject to the duty now imposed upon marble in blocks.

Under this Statute, the generic name grindstones covers both the rough or unfinished and the finished stones. Two classes were created by the proper adjectives, because the legislature wished to impose different rates of duty according to the different conditions of finished and unfinished. Sawed, dressed and polished marble is excepted from building and monumental stone, under the term of "marble," and differing rates of duty imposed, according to specified conditions, because the legislature wished to impose different rates of duty on those different conditions.

But further on they are all mentioned collectively under the head of "marble" in the proviso, where even marble slabs and marble paving tile mentioned as such *eo nomine*, are again mentioned as "such marble," and if they exceed six inches in thickness are classed as marble in blocks. Advertent as the legislators were here to the differences between wrought and unwrought, finished and unfinished, sawed, dressed and polished, as applied to marble and grindstones, they were equally advertent to the same things in the granite, building or monumental stone clause placed immediately between the two, and out of which they carved from all building and monumental stone the exception of marble only. We have seen what "marble" comprises and means here, and the conclusion is irresistible that Congress had a different intention as to granite, and all building and monumental stone, from what it had as to grindstones and marble. That different intention being that "all" as the Statute declares of the former should pay one single rate of duty, viz., $1.50 per ton, wrought or unwrought, finished or unfinished, sawed, dressed or polished, as the case might be, while marble and grindstones were, by fit expressions, separated into different classes, according to workmanship, and at various rates of duty.

In short, we must conclude that they intended what they said. How else is effect to be given to the significant word "all," which absolutely estops this metaphysical diminution of the comprehensiveness of the Statute?

In the Revised Statutes, where opportunity was offered for the correction of errors, if any existed, this legislation was re-enacted with slight change, viz.:—

Stones:—Freestone, granite, sandstone, and all building or monumental stone, except marble, one dollar and fifty cents per ton.

Under this act our importations were made.

The act of 1883, although subsequent legislation, we refer to as in marked contrast with the terms used in the Revised Statutes. By force of the language of the act of 1883, two classes are manifestly created of what in the Revised Statutes was one class only.

The theory of the government in this case is that by *construction* the single class of the Revised Statutes should be separated into two classes, which is in violation of its text and of the intention of Congress. For when Congress has the intention ascribed to it by the government, Congress well knows how to carry out that intention, and its method is that adopted in the act of 1883, as well as in acts prior to the Revised Statutes.

Comparison of the act of 1883 with the acts prior to the Revision, does show that *when the intention was* to separate building stone into classes for different rates of tax or exemption, like methods as in the act of 1883 were pursued, and terms of limitation and qualification *expressly inserted*, viz.:—Act of 1864, "Building stones in block, rough or unwrought."

Act of 1883, unmanufactured or undressed building stone not specially enumerated, &c.

Act of 1864, "Building stone when dressed, hewn or finished."

Act of 1883, "Stones as above (*i. e.*, building stone) hewn, dressed or polished."

Whereas the Act of 1866, when no distinction was intended, includes all the varieties of finished building stone under the term "building stones of all kinds."

As in like manner does the Act of 1870 and the Revised Statutes when they say "all building stone."

It is clear from the Statutes that whenever Congress intended to split up building stone into classes according to finish or condition, it has done so by using the proper adjectives, creating and defining those classes. Whenever it has intended to provide for all building stone, &c., comprehensively including all classes, it has omitted the adjectives relating to conditions of finish.

And where we find the omission of such adjectives, we are not to assume that the omission was accidental, or that by intendment such words are to be supplied, but directly the reverse.

The application of the Statute to the goods in dispute, and the consideration of the testimony as to what they were in fact was for the jury.

True, the Court might, upon the uncontradicted testimony, have directed the jury to find for the plaintiff, as the evidence was all one way, that this was granite and building and monumental stone, but it had no power to direct a verdict for the defendant contrary to this evidence, and if he saw fit to refuse a direction to find for the plaintiff, then the evidence should have been submitted to the jury, with proper instructions.

The evidence ignored by the Court relating to what the goods were in fact, and by what names they were generally known was,

Mr. Moffitt's testimony, fol. 29-30.

I have been in the granite business for the last ten years. The material of these goods is granite; the uses were for buildings and outside structures and interior construction; the monuments were for erection in cemeteries. The labor that was put on the granite was for the purpose of fitting it for building and monumental purposes.

These goods were granite, as that term is known and generally used.

Mr. Upjohn's testimony, fol. 33-34.

That he was an architect of thirty years' practical experience in the erection of buildings. I heard Mr. Moffitt's description of the different cargoes imported by him. Granite was the proper term to describe them by in general. I never heard granite spoken of otherwise than as granite, no matter what its stage of finish is, it does not change its name from the time it is in the quarry until it goes into the building.

Building stone means any stone available for building, whether cut or uncut.

Shafts, dies, parts of monuments, fall under the common and accepted definition of monumental stone, if they were intended for monumental use.

Mr Croes, page 14.

That he was a civil engineer of 25 years' practical experience. A column, or shaft, or pedestal, which enters into the construction of a building is building stone, and is known as building stone. Any thing is building stone which is essential to hold the building up, and is generally so known and called.

Fol. 37. In the use of the word granite, there is no limitation in general as to its condition,—of preparation or finish.

See also testimony of John N. Dyer, one of defendant's witnesses, page 18 of Record.

My business is the granite business. In the granite business we do monumental and fitting work, we build monuments and buildings and cut building stones. We do the work for masons, sometimes for the owners. We make monuments and set them up in the cemetery. The articles in their parts before they are erected are called monuments.

On cross-examination he testified: Q. Do you set stones? A. Yes sir, we set our own monuments in general. Q. Do you set building stone? A. Sometimes we do; very rarely; we generally give that out. The people who set that stone are called granite setters, and brown stone setters, and any kind of stone they set. They can set any kind of stone. Q. In what condition is the stone when it is set? A. Why, it is finished. The man setting the stone is called a stone setter. I understand very little about marble. I am a granite man entirely.

Upon such testimony as this, that from the birth of the article until it was set into a building it was in fact building stone, and so known, and monumental stone as the case might be, and so known, and granite and so known, and that the plaintiff's articles were such things and so known and without any contradictory testimony, what right had the Court to withhold such testimony from the jury and apply the statute himself to the imported articles in a sense directly contrary to such testimony?

III.

Other cardinal errors of the Court were in refusing to charge the jury properly, and in charging the jury improperly, on the law of similitude, in the event that the jury should find the goods non-enumerated, in which event he was asked to charge that if a similitude was found to exist between the importations and granite and all building or monumental stone, either in material, quality, texture or use, then they must be classed for duty with the enumerated articles they most nearly resemble in either of these particulars, according to the most exact likeness found to exist.

And that the intent of the rule was that non-enumerated articles which were the same or substantially the same, either in material, quality, texture or use, as enumerated dutiable articles should be classed together, and if such similitude existed, the articles could not be classed as non-enumerated manufactured articles, nor could they be so classed if the jury found them to be granite in material, quality, texture or use, and not otherwise enumerated or provided for.

Instead of these requests he gave the objectionable ones that "the identity or the likeness must be similar in various particulars."

"It may be said so far as this case is concerned that the mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer."

"That raw material may be so wrought upon or worked by the hand of the artisan or the artist that it changes its character, that some other name will more properly and better describe it," "so that some other name is applicable to it."

That the jury might find on the proof—"That the articles "were manufactured articles not before provided for either "directly or by similitude to other articles mentioned in other "portions of the Statute. If you so find, that ends the case, "your verdict should be for the defendant."

Also that if the jury should find no substantial similitude between the articles imported and any other articles mentioned in the tariff, their verdict should be for the defendant.

We may first remark of the similitude section that it is a rule prescribed by the legislature for ascertaining and determining the effect of its own enactments.

And if ever the language of this Court in Binns v Lawrence, 12 How. 17–18, should be applied, it is to the text of a legislative rule of construction—"That whenever the will or intention of "the law making power is declared in plain and unequivocal "terms, that will or intention must be followed—absolutely "followed."

This similitude rule is not to be disregarded or modified at the discretion of the court below—the plainly declared legislative will is to the contrary.

It declares absolutely, in the *disjunctive*, that the similitude in *either* one of the enumerated particulars, material, quality, texture or the use to which it may be applied, shall, if found to exist, control the classification, in the absence of all the others.

The court below declared that "the identity or the likeness must be similar in various particulars," thus contradicting the statute, and that there should be no mistake about his meaning, he went on to say, "Mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer," and that if labor had been expended on the material so that a new name arose, material should have no effect.

But the law was intended to apply to things having different names from those enumerated, and to classify them by similitude in material, &c., to things that were named.

Differences in name so far from being an objection to the application of the similitude rule furnish the reason for the existence of the rule, and the only cases where it can be applied; for if there was no difference in name, there would be no non-enumerated articles.

That the points of similitude are used in the disjunctive is decided by Judge Lacombe, Circuit Judge of the 2nd Circuit in Weilbacher v. Merritt, 37 Fed. Rep'r, 89.

"This clause does not require that the resemblance should be in all four of the particulars mentioned." So we have a district judge of the 2nd Circuit at a Circuit Court, holding one way, and a Circuit Judge of the 2nd Circuit, holding at Circuit the other way.

Second. Identity of material can in no case be disregarded in determining questions of classification under Sec. 2499 R. S. Webster defines:

Similar: 1. Exactly corresponding, resembling closely, precisely like. 2. Somewhat like, nearly corresponding, resembling in many respects.

Similitude. The state of being similar or like; resemblance, likeness, as similitude of substance.

Like a. 1. Equal in quantity, quality or degree, exactly corresponding, &c.

Like n. The counterpart; an exact resemblance, a copy.

The object of the law being to put like with like, identity is of the highest importance and the first sense of similitude in which the rule is to be applied.

And as to "material," that is the first particular of similitude named in Sec. 2499; and also the last clause of the section is absolute that a non-enumerated article composed of two or more materials shall pay the highest rate of duty levied on either material. An article composed of one material only is already in the first clause of the section, made dutiable according to that material if it be a dutiable one, by reason of similitude with it in that respect. Thus, material is, so to speak, the alpha and omega of the section.

Considering that the statute says if a non-enumerated article "bears a similitude either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title as chargeable with duty," it shall pay "the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars b-fore mentioned," it was clearly error in the Court to charge a jury that of a non-enumerated article under the similitude statute the material of which it was composed was unimportant or of slight importance.

Change of name, whether resulting from labor or otherwise, was, under this statute, of no consequence, "*material*," *not name*, was the statutory test.

The Court instructed the jury in effect that granite, which, by manipulation and labor, had come to be called hammered, cut or polished granite, or building stone, or monumental stone, or bases, caps, ashlar, &c., because of such new names was no longer in material "granite."

As a legal proposition we cannot assent to this. The importation is an entity, and if granite is not the material of which it is composed, then it has no material and must be but a mental conception, non-existent in fact.

The evidence was, that from first to last it was granite in name and in fact, and whatever was done to it did not change its name of granite.

In any view that we are able to take of it, this charge is erroneous and tended only to mislead the jury, setting up "some other name" in place of "material, quality texture or the use to which it may be applied," which are the only statutory requisites on which similitude can be based.

This Court has held in Murphy v. Arnson, 96 U. S., 131, 133, that the similitude, "in the use to which it may be applied," plainly refers to the employment of an article or its effects in producing results, rather than to its adaptability for sale as a substitute for another commodity.

It was in evidence that the use of unwrought granite was for building and monumental purposes and that plaintiff's importations were fot the same purposes.

A particular and important quality of color, besides strength and durability and texture, were also noted in evidence.

Thus there was an exact likeness in the highest form, identity in all the statutory particulars.

The requests and exceptions taken were necessary, in view of what the Court had charged, to inform the jury of the exact scope and meaning of the similitude law and were improperly refused.

The jury were led to believe, by the charge of the Court, that finding an absolute identity to exist between the enumerated articles, granite and building stone and the imports in question, they might, nevertheless, disobey the statute and disregard this identity on the plea that it was not "a substantial similitude."

This was erroneous. It was not for the Court to say, as matter of law, nor for the jury to find that an exact compliance with statutory requirements was not substantial. Otherwise a legislative rule of construction would be abrogated.

The question of a substantial similitude in the statutory particulars could only arise where the likeness was not exact in those particulars—under the secondary meaning of similitude—but where *identity* was *proved*, no question could intervene of *substantiality. It is substantial because the statute says so.*

And if that exact similitude existed—as was proved—the Court had no power to say that it was immaterial or to say to the jury that they might disregard it.

If this is not so, then Congress can only give the forms of legislation without its substance, for under the guise of interpretation not only is the legislation altered, but the very rule prescribed by Congress for ascertaining its intent in doubtful cases, is departed from, where its exact terms have been complied with and it is precisely applicable.

IV.

The Court further erred in ruling at the close of plaintiff's case, that as matter of law the importations were manufactured articles and also in charging the jury, fol. 61.

You may find gentlemen, upon this proof, that these articles are covered by this section of the statutes; that is, that they were manufactured articles not before provided for, either directly or by similitude to other articles mentioned in other portions of the statute. If you so find, that ends the case. Your verdict should be for the defendant.

The testimony showed that these pieces of granite had been split out after plans designed for buildings or monuments, and that the labor bestowed upon it was for the purpose of fitting it for building and monumental purposes.

Granite and all building or monumental stone were *enumerated articles.*

This court has lately held upon the subject of manufactured articles in the case of shells, ground and polished for ornamentation and etched with acids, producing inscriptions and the Lord's prayer upon them, that they were not manufactured, and were not manufactures of shells, and were free of duty, the statute being "Shells of every description not manufactured," free, and "Shells, manufactures of, 35% ad val."

Hartranft v. Wiegman, 121 U. S., 609, 615, 616, where too the decisions upon manufactured articles are collated. And our stone statute is not limited and qualified by "manufactured," or "unmanufactured," as in the shell case. The mere preparation of this building stone to make it more fit and suitable for its intended use as building stone, did not convert it from building stone into any different article, or into a manufactured article, any more than in the case of the shells.

Secondly. If these importations were enumerated articles, if they fell within the description of "Stones, granite and all building or monumental stone," then they were dutiable as such by virtue of such enumeration; and this court says in Arthur v. Butterfield, 125 U. S., 70-76,

"To place articles among those designated as enumerated, it "is not necessary that they should be specifically mentioned. "It is sufficient that they are designated in any way to "distinguish them from other articles. Thus the words "'manufactures of which steel is a component part,' and "'manufactures of which glass is a component part,' have "been held a sufficient designation to render the goods enume- "rated articles under the statute, and take them out of the "similitude clause. Athur vs. Sussfeld, 96 U. S., 128.

"Upon the same principle, 'manufacturers of hair' must "be held a sufficient designation to place such manufactures "among the enumerated articles."

In the Sussfeld case the specific name of the goods was "steel spectacles." In the Butterfield case, the specific names were "brilliantines, lustrines, alpacas, and mohairs."

Of what consequence was it then, that our building stone was known by subordinate architectural terms, such as ashlar, shafts, caps, dies, &c.?

Thirdly. If the articles were non-enumerated, they were to be classified by similitude if possible with some enumerated dutiable article, before they could fall into the residuary clause under which the Collector acted.

That the statutory similitude existed in this case had been shown by full, undisputed and unimpeached evidence. The jury had the physical power and the opportunity to disregard it, but they had no lawful power so to do, and a verdict contrary to the evidence would properly have been set aside for that reason. And the Court had no right to tell them in his charge that they might find the articles to be neither enumerated or provided for by similitude, upon the proofs presented to them.

The question of error is, do the proofs presented by the Bill of Exceptions sustain such a charge? And we say the Court erred in charging as he did.

Murphy v. Arnson, 96 U. S., 132.
Morlot v. Lawrence, 1 Blatch., 608.
Ross v. Peaslee, 2 Curtis, C. C., 500–501.
Arthur v. Fox, 108 U. S., 128.

The judgment below was for the reasons assigned erroneous and should be reversed with costs.

EDWARD HARTLEY,

WALTER H. COLEMAN,

Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN M. MOFFITT, PLAINTIFF IN ERROR,
vs.
CHARLES E. MILLER AND DANIEL G. Rollins, executors of Chester A. Arthur, late collector, etc. } No. 54.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANTS IN ERROR.

This is an action by an importer to recover back the amount of an alleged excessive exaction of duties on three separate importations into the port of New York from St. John, New Brunswick, by the schooner *Ben Bolt*, in the months of July, October, and December, 1875.

The appraiser, after examining the merchandise described in the invoice of the July importation, reported it to be "44 cases monuments and 22 cases polished panels," and classified them for duty at 20 per cent. as non-enumerated manufactured articles (p. 8).

The October importation he reported as "monuments and rough granite," and classed the former for duty at 20 per cent. as non-enumerated manufactured articles, and the latter at $1.50 a ton, as "granite, rough and unmanufactured" (p. 8).

The December importation he reported as "monuments and polished granite," and classified them for duty at 20 per cent. as "non-enumerated manufactured articles" (p. 8).

The plaintiff's entry of the July importation described it as "66 *cases building stone;*" his entry of the October importation described it as "99 cases polished granite and 14 pieces rough granite;" and his entry of the December importation described it as "59 cases polished red granite and 32 cases monuments" (p. 8).

The collector levied and collected the follow-

ing rates, namely, on the 14 pieces of "rough red granite," a duty of $1.50 per ton under section 2503, and Schedule M of section 2504, Revised Statutes. Section 2503 provides that "There shall be levied, collected, and paid upon all articles mentioned in the next section imported from foreign countries the rates of duty which are by the schedules respectively prescribed," and Schedule M of section 2504 contains this provision: "Stones: freestone, granite, sandstone, and all building or monumental stone, except marble, one dollar and fifty cents per ton," and on all the remainder of the importations he levied and collected a duty of 20 per cent. *ad valorem* under section 2516, Revised Statutes, which is as follows:

> There shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not herein enumerated or provided for a duty of ten per centum ad valorem, and on all articles, manufactured in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem (p. 9).

The bill of exceptions (pp. 9–19) shows that the plaintiff introduced evidence tending to show that the term "*granite*" was used indifferently to designate that sort of stone in its rude state as

well as every artificial form in which it appears, and also that granite, in any of its states, properly came under the head of "building or monumental stone;" that the articles held by the collector to be dutiable as "manufactured" required more or less manipulation before they could be made to answer the purposes for which they were made, and to this was added testimony tending to show the substantial differences between granite and marble both as to original formation and use, and the superiority of granite to marble for purposes requiring exposure to weather.

The defendant gave evidence tending to show resemblances between marble and granite in the uses to which the two kinds of stone are applied; that marble monuments, like granite ones, are constructed in pieces and then put together, and are called monuments when in pieces, and that granite and marble differ as to durability.

The court charged the jury: I. That it had been settled in that court, by the previous decision of an able judge, that articles such as the collector held to be dutiable in this case at 20

per cent. ad valorem were not enumerated in the provision of the tariff laying a duty of $1.50 per ton on "Stones: freestone, granite, sandstone, and all building or monumental stone, except marble."

II. That as the plaintiff had in his protest (p. 9) called attention to the similitude clause of the tariff, namely, section 2499 R. S., he should be taken to have made the point that the articles in question were dutiable at $1.50 by reason of resemblance to the articles mentioned in the tariff provision next hereinbefore cited, in addition to his other point that those articles were enumerated in that provision. The Court then referred to the fact that the District Attorney had claimed that the articles were dutiable, by virtue of the similitude section, under another provision contained in schedule M, section 2504, namely:

> *Marble.*—Marble, white statuary, brocatella, sienna, and verd-antique, in block, rough or squared, one dollar per cubic foot, and in addition thereto, twenty-five per centum ad valorem; veined marble and marble of all other descriptions, not otherwise provided for, in block, rough or squared, fifty cents per cubic foot, and in addition thereto, twenty per centum ad valorem; sawed, dressed, or polished marble, marble slabs, and marble paving-tiles, thirty per centum ad valorem, and, in addition, twenty-five cents per superficial square foot not exceeding two inches in thickness. If more

than two inches in thickness, ten cents per foot in addition to the above rate for each inch or fractional part thereof in excess of two inches in thickness, but if exceeding six inches in thickness, such marble shall be subject to the duty imposed upon marble blocks. All manufacture of marble not otherwise provided for, fifty per centum ad valorem.

Thereupon the court told the jury that if they found that the articles imported bore a resemblance to the articles named in the provision relied on in the protest—pointing out at the same time the particulars in which such resemblance might consist and illustrating the subject by examples—they should return a verdict for the plaintiff, but that it would not be enough to entitle the plaintiff to recover to show that the articles imported equally resembled those enumerated in some other provision than the one relied on in the protest, or to show that the articles imported bore a greater resemblance to articles enumerated in some other provision than the one relied on in the protest.

The court told the jury that it was the collector's duty to look through the tariff to see whether the articles in question were therein enumerated, and if they were not found so to be, then to see if they were dutiable under the

similitude clause, and, if not, then to assess the duty under the provision under which he did in fact assess it.

PARTS OF THE CHARGE SPECIFICALLY EXCEPTED TO BY THE PLAINTIFF.

1. "You may find, gentlemen, upon this proof that these articles were covered by this section of the statutes—that is, that they were manufactured articles not before provided for either directly or by similitude to other articles mentioned in other portions of the statute. If you so find, that ends the case; your verdict should be for the defendant."

2. "I have said in your presence, and I say now, that they were not specifically enumerated in the tariff law." "So I say to you, as matter of law, that these articles were not enumerated and specifically named under this section of the statute, to which reference has been made by the importer," viz, Stones: granite, and all building and monumental stone.

3. "You will bear in mind that under the similitude clause the identity or the likeness must be similar in various particulars. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or in the use to which it may be applied to any ar-

ticle enumerated in the tariff. It may be said, so far as this case is concerned, that the mere identity of material is not in and of itself necessarily sufficient to place these articles under the section referred to by the importer."

4. "In other words, raw material may be so wrought upon or worked by the hand of the artisan or the artist that it changes its character; that some other name will more properly and better describe it. In other words, as I stated to you, gentlemen, the work of the artisan, the mechanic, the artist may change the raw material so that some other name is applicable to it."

5. "If, however, you find that these articles or any portion of them because there has been no evidence offered which would justify the court in authorizing you to separate the various invoices, more nearly assimilated to other articles in the tariff to which your attention has been called, or if you find that there is no substantial similitude between these articles and any other articles mentioned in the tariff, then your verdict should be for the defendant."

PLAINTIFF'S REJECTED REQUESTS.

The plaintiff tried (by requests 1, 2, 3) to get the court to lay down that, whether the stone imported was rough, polished, or cut to size or shape, they must find for the plaintiff if they found that

it all went under the name of granite (pp. 22, 23).

The fourth, fifth, and sixth requests related to the similitude provision, and are fully covered by the court's charge (p. 23).

The seventh request raised the point that whether the articles in suit are granite or building stone or monumental stone is a fact for the jury, under the instructions of the court (p. 24).

The eighth request was that if the jury found that the articles in question were known in the trade and commerce of the country at the date of the passage of the tariff act of 1870, the plaintiff was entitled to a verdict (p. 24).

The ninth request stated that, as it is conceded and fully established by the evidence that the articles in suit are granite and were so known to the trade before and have been since 1870, the jury must find for the plaintiff.

ARGUMENT.

I.

Do the articles in question fall within the provision "Stones: freestone, granite, sandstone, and all building or monumental stone, except marble, one dollar and fifty cents per ton"?

The plaintiff insists that under a tariff, clearly protective in policy, all distinction is ignored between rough, undressed granite, as taken from the quarry, and granite that has received a large additional value by the skill of the artisan; in other words, the polished granite shaft of the monument, the granite blocks carved and polished to ornament buildings, are to be brought into our ports to compete with our home labor at the same rate of duty as unhewn granite.

Was it, then, the intention, in laying a duty of $1.50 per ton on "STONES," to embrace stones highly wrought and polished, as well as undressed? Is it probable the legislature would have expressed such a purpose in such a way? Is it quite respectful to the legislative department to attribute such a use of language to it?

It is submitted that it is hardly reasonable to say that under the term *granite stones* granite fashioned and dressed so as to be adapted to the most sumptuous uses is dutiable only at $1.50 per ton.

The tariff, like all other instruments, is to have a reasonable, common sense interpretation, and where words in common use occur in it they must, as a general rule, be understood as commonly used. Who, then, contracting to furnish *granite stones*, would be expecting to be called on for fluted columns or a richly wrought entablature to rest on them?

On March 20, 1871, the Treasury Department held that section 21 of the act July 14, 1870, carried into the Revised Statutes, applied only to granite in an unmanufactured state.

And on January 16, 1873 (S. S. 1375), that decision was confirmed, and was followed on September 5, 1874 (S. S. 1938), by another decision, in which it is said:

> The Department has uniformly sustained the construction that the term "granite," as used in the law defining the duty on building stone, *only applies to unmanufactured or undressed granite.*

It is true that on February 1, 1875, Assistant Secretary of the Treasury Conant ruled, in a letter to the Secretary of War touching stone which certain Canadians had put in a bid to furnish to the United States, that the stone was dutiable at $1.50 per ton, "*dressed or undressed.*" It is to be remarked that this letter is perhaps not of the authority it would be if it had been framed for the instruction of collectors of customs.

It is submitted that no other construction than the one contended for is reasonable or admissible in a tariff which winds up (§ 2516, R. S.) with a sweeping residuary clause levying a duty of 25 per cent. ad valorem "on all articles manufactured in whole or in part not herein enumerated or provided for."

The action of the court below, in this particular, was based on a previous ruling in the same court by Judge Shipman, made on full consideration.

It is, we submit, proper for the court to give weight to the fact that the tariff is based on a protective policy, in a case like this where the particular policy of the law will be defeated or

not, according as a broad or a narrow sense is given to a word.

While it is true that a tax is not to be laid on doubtful premises, it is also true that revenue laws are to receive a liberal interpretation, and are not to be taken with the strictness of criminal laws.

A good illustration of our view of the law is to be found on page 6 of the opposite brief. It is there said that the internal-revenue act of July 13, 1866, § 10 (14th Stat., 148), "exempts from tax 'building stone of all kinds, including slate, marble, freestone, soapstone, and rock and ground gypsum,' *and also exempts* MONUMENTS OF STONE OF ALL KINDS not exceeding in value the sum of one hundred dollars." This shows clearly *that Congress did not mean in that law that monuments should come in under the head of building stone*, as it is contended Congress did mean in the tariff act of 1870. As another illustration we refer to the plaintiff's *invoices* (p. 8), which do not seem compatible with the plaintiff's theory that dressed granite may be properly described as *granite* simply.

As for the act of March 3, 1883, now in force, so far from its lending the support claimed in the opposing brief (p. 7), it works in our favor, for that act is, we think, plainly *a legislative interpretation of the words of the act of* 1870, under which it is claimed the articles imported are dutiable at $1.50 per ton. On the other hand, is it to be said that the construction we contend for is to be lightly discarded in the case of a repealed law, the interpretation of which, as to "stones," was acquiesced in by Congress for thirteen years?

REPLY TO THE POINTS OF THE PLAINTIFF IN ERROR.

I.

The court did not withhold from the jury the plaintiff's evidence that the imported articles went under the name of granite, as is stated (Brief, p. 11), but the court, being of opinion that Congress did not intend to include manufactured or dressed granite under the term "STONES," so said to the jury. When it appeared to the court *from the face of the statute* that the *stone* meant was *undressed*, what occasion was there for the

jury to pass on the evidence before them that granite in the commercial sense meant both dressed and undressed, unless it was in some way their province to fix the meaning of the statute? The question was not how many different things went under the name "*granite*," but *which of those things* the statute referred to. To determine this was the work of the expositor solely, and therefore a pure question of law.

II.

It is here complained (brief p. 15) that the court erred in ruling that the statute did not enumerate the articles imported.

It is unnecessary to repeat what has been said above in support of the view taken by the court in this particular.

We notice what seems a very misleading view of the law in the plaintiffs' assumption that the statute means by building stone and monumental stone, stone shaped for those purposes (Bf., p. 17). In a word, that it is the hand of man that gives the quality of *building* or *monumental* stone under

the law. The statute, we think, has no such sense, but when it refers to building and monumental stone means stone that may be used for those purposes. Hence, it is perfectly proper to speak of stone in the quarry as building or monumental stone, as Mr. Upjohn, the architect, says in his testimony (p. 12). The court will not fail to see through this ingenious attempt to bring manufactured stone within the sense of the clause under which it is claimed these importations were dutiable.

When we reflect how little attention is generally paid to the language of statutes, we trust that we may be excused from noticing particularly the discussion based on various forms of expression used in the several tariff acts, as a sort of discussion that does not generally advance an argument on the tariff. There is too much of the merely accidental and unpremeditated in the language of legislation to make identity or differences of expression in statutes *in pari materia* always of much assistance in arriving at the legislative intention.

III.

This point (Bf., p. 23) relates to that part of the court's charge that deals with the similitude provision.

It needs only to see clearly what the court did charge on this head to be satisfied of the unreasonableness of the position of the plaintiff in error.

The court, in addition to reading the similitude provision, read from the opinion of the Chief-Justice in Fox *v.* Arthur (108 U. S., 125), in order to give the jury an explanation of the similitude clause *in the very words of this court* (p. 21), and no unbiased mind can derive from the charge an impression that the clause requires that all the particulars in which similitude may consist should co-exist.

The practice of tearing a word or a sentence from the context of a judge's charge and holding it up as a reason for asking this court to impute error is a kind of criticism that has not been received with much favor here.

The charge speaks for itself, and it would almost be a reflection on the learned judge for me to attempt any defense of what he said in expounding the similitude clause to the jury.

This court will not disturb the judgment, it is presumed, unless it appear that what was said was calculated to mislead the jury.

That the court was right in refusing to tell the jury that there was a similitude in matter of material between granite stones and granite elaborated by the artisan would seem clear. The argument advanced by the defendant in error would establish a similitude in material between ordinary canvas and the canvas surface of a great painting, or between a block of marble and a statue, supposing these examples to fall within the similitude provision.

In such cases the labor expended on the crude material has transformed the substance, so that in the one case the picture takes the place of the canvas, and in the other the statue the marble. The hand of the artist or the sculptor has created a new thing. Indeed, in each of the cases supposed, the crude material became the property of

the painter or sculptor by the Roman law, "for," say the Institutes, "it is ridiculous that a painting of Apelles or Parrhasius should be but the accessory of a thoroughly worthless tablet" (Inst., Bk. 2, tit. 1, § 34).

Now, what the court did was no more than to apply this well-established principle of law and common sense.

IV.

All we need say under this division of the opposite brief is that there is no foundation for the therein claimed similarity between this case and Hartranft *v.* Wiegemann (121 U. S., 615), where it was held that merely decorating shells, *to be used as shells*, did not make them manufactures of shells because, as the court says—

> They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell.

It is respectfully submitted that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.